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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 900.

CAROLINE A. MOORES, PLAINTIFF IN ERROR,

vs.

THE CITIZENS NATIONAL BANK OF PIQUA, OHIO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JULY 11, 1882.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and western division of the southern district of Ohio, begun and held at the court rooms in the city of Cincinnati on the first Tuesday of February, being the sixth day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and in the one hundred and seventh year of the independence of the United States of America—present, the Honorable John Baxter, circuit judge—

Among the proceedings had were the following, to wit:

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

Be it remembered that heretofore, to wit, on the twenty-fourth day of March, in the year of our Lord one thousand eight hundred and seventy-three, came Caroline A. Moores, the plaintiff herein, by A. Taft and Sons, her attorneys, and filed in the clerk's office of the court aforesaid her certain petition against the said defendant, clothed in the words and figures following, to wit:

2 *Petition.*

Circuit court of the United States for the sixth circuit and southern district of Ohio.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

The plaintiff states that the defendant is a corporation duly incorporated by the laws of the United States; that the said defendant has its banking-house in the city of Piqua, in this state, and has its transfer office therein; that on July 15th, in the year eighteen hundred and sixty-seven, and prior to that time, G. Volney Dorsey was president and Robert B. Moores was cashier of the defendant, and were charged with the keeping of its transfer books and the issuing certificates of ownership of its stock.

That on or about 15th day of July, A. D. 1867, while the said G. Volney Dorsey was president and the said Robert B. Moores was cashier of said defendant as aforesaid, the plaintiff purchased of the said defendant ninety-one shares of the capital stock of said Citizens' National Bank of Piqua, and paid therefor in money the sum of $9,100.00, and received from said bank a certificate therefor in the usual form of certificates of ownership of stock in said bank. Certificate was in the words and figures following, viz:

3 The Citizens' National Bank of Piqua,

[stamp.] No. 56. state of Ohio. [91 shares.]

This is to certify that Mrs. Carrie A. Moores is entitled to ninety-one shares, of one hundred dollars each, of the capital stock of the

Citizens' National Bank of Piqua, transferable only on the books of the bank, in person or by attorney, on the surrender of this certificate.

Piqua, O., July 15, 1867.

C. VOLNEY DORSEY,
President.

Rec. 205–1. (Signed) ROBT. B. MOORES, *Cashier.*

That the plaintiff supposed the said certificate to be and received it as a genuine and valid certificate for what it purported to be, and the signatures of the said president and cashier of said defendant were genuine and in the proper handwriting of said G. Volney Dorsey as president and Robert B. Moores as cashier, and that said certificate conforms in every respect to the defendant's certificates for its stock, which are admitted to be genuine, and such as the defendant has always been in the habit of issuing; that the par value of said stock was one hundred dollars per share, and its market value at the date of said certificate was at or above par.

4 That the defendant now refuses to recognize the plaintiff's ownership of said stock, or to pay dividends thereon, and justifies its refusal, and alleges and maintains that said stock is spurious and issued without any authority of said defendant, whereby said certificate is rendered worthless and unavailable in the hands of the plaintiff; that the plaintiff has requested the defendant to repay or reimburse her the amount of the market value of ninety-one shares of its stock at the time when plaintiff purchased the said stock and received said certificate as aforesaid, but that defendant has refused to pay the said amount, or any part thereof.

The said plaintiff, therefore, as a holder of said certificate for ninety-one shares of the stock of the said defendant, whereby it is certified in due form of law, and by its regularly appointed and elected officers, that the plaintiff was entitled to ninety-one shares of said capital stock, whereas as it appears by defendant's present assertions that the said stock was wrongfully issued by said officers of said defendant, claims to recover the par value of said stock, viz, $9,100.00, with interest thereon, and she prays judgment therefor, together with her costs and allowances, and for such other relief as she may be entitled to.

A. TAFT & SONS AND
M. C. SHOMAKER,
Att'ys for Pl'ff.

SOUTHERN DISTRICT OF OHIO, *ss:*

5 Caroline A. Moores, being duly sworn, says she is plaintiff in this action; that she has heard the above petition read and knows the contents thereof, and that the same is true to the best of her knowledge and belief.

CARRIE A. MOORES.

Sworn to before me and subscribed in my presence this 21st day of March, 1873.

[SEAL.]

CHARLES B. WILBY,
Notary Public, Hamilton co., Ohio.

Which said petition was endorsed as follows, to wit:

To the Clerk:

Issue summons, action for recovery of money only; am't claimed, $9,100, with int. from July 15, 1867.

A. TAFT & SONS AND
M. C. SHOEMAKER,
Att'ys for Pl'ff.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of summons, directed to the marshal of this district and against the said defendant, clothed in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA, } ss.
Southern district of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon the Citizens' National Bank of Piqua, citizen of and resident in the state of Ohio,
6 if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the second Tuesday in the month of April, 1873, to answer unto Caroline A. Moores, citizen of and resident in the state of ———, in an action for the recovery of money only.

And have you then and there this writ.

Witness the Honorable Salmon P. Chase, chief justice of the United States, this 24th day of March, A. D. 1873, and in the 97th year of the independence of the United States of America.

[SEAL.] Attest: THOMAS AMBROSE, *Clerk.*

Memorandum.—The plaintiff will be entitled to her judgment on the 4th Tuesday of April next.

THOMAS AMBROSE, *Clerk.*

Marshal's return on summons.

And afterward, to wit, on the 25th day of March, in the year last aforesaid, came the marshal to whom the said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

I rec'd this writ at Cincinnati, O., at 11:30 a. m. on the 24th March, 1873, and served the same by copy as follows on the att'ys for def't; Matthews, Ramsey & Matthews, att'ys for def't.

7 March 25, 1873. W. R. THRALL, *Marshal,*
By J. P. PHARES, *Dep.*

And afterwards, to wit, on the 22nd day of April, in the year last aforesaid, came the said defendant, the Citizens' National Bank of Piqua, Ohio, by Matthews, Ramsey and Matthews, its attorneys, and filed in the clerk's office of the court aforesaid its certain answer to the petition herein, clothed in the words and figures following, to wit:

Answer.

United States circuit court, southern district of Ohio.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

The defendant admits that it is incorporated as alleged in the petition; that it has its principal office in Piqua, in this state; that G. V. Dorsey was president and R. B. Moores cashier on July 15, 1867; but denies that they were charged with the duty of keeping the transfer books and issuing stock.

The defendant denies that the plaintiff purchased ninety-one shares of its capital stock, or any other amount, on or about July 15, 1867, or at any other time, and denies that plaintiff received a cer-
8 tificate from said bank for any shares of its capital stock. Wherefore defendant prays to be hence dismissed.

MATTHEWS, RAMSEY & MATTHEWS,
Att'ys for Defendant.

STATE OF OHIO, } *ss.*
Miami co., }

G. V. Dorsey, president of defendant, on oath says that the allegations of the foregoing answer are true, as he verily believes.

G. VOLNEY DORSEY, *Pres't.*

Sworn to before me and subscribed in my presence April 21st, 1873.

[SEAL.] S. S. McKINNEY,
Notary Public.

And afterwards, to wit, on the eleventh day of February, in the year of our Lord one thousand eight hundred and seventy-four, an entry was made upon the journal of said court in said clause, clothed in the words and figures following, to wit:

J'rn'l Entry.—Leave to Amend Petition.

Caroline A. Moores
vs.
Citizens' National Bank of Piqua, Ohio. } 1734. Money.

This day came the plaintiff by her counsel, and exhibited to the court an amended petition, and asked leave to file the same, to which the defendant, by its counsel, objected; and the court being fully

advised, overruled said objection, and granted the leave asked, and said amended petition was accordingly filed, to all of which
9 the defendant, by its counsel, excepted; which said amended petition is clothed in the words and figures following, to wit:

Amended Petition.

Circuit court of the United States, southern district of Ohio.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

The plaintiff by leave of court, and by way of an amended petition, states that the defendant is a corporation duly incorporated under the laws of the United States; that the defendant from the time of its incorporation, in the year 1864, to the present time has had its banking house in the city of Piqua, in the state of Ohio, and has had and kept its transfer office for the transfer of its stock therein; that on the fifteenth day of July, A. D. 1867, and prior to that time, G. Volney Dorsey was president and Robert B. Moores was cashier of the defendant, and that they were charged with the keeping of its transfer books and the issuing of certificates of ownership of stock in said corporation.

That the limitation of the capital stock of said corporation was one thousand shares of one hundred dollars per share.

10 That soon after the creation of the corporation, and about the time of the organization of said corporation, in the year eighteen hundred and sixty-five, the entire amount of the capital stock, viz, one thousand shares, or one hundred thousand dollars, was taken and the money paid to the corporation therefor, and certificates issued to the stockholders therefor.

That the said Robert B. Moores at that time represented himself to the plaintiff as an owner of a large amount of stock in said corporation, and appeared upon the books of said corporation as the owner of more than ninety-one shares of said capital stock, of the value of $100.00 each share.

That on the 15th day of July, A. D. 1867, while the said G. Volney Dorsey was president and the said Robert B. Moores was cashier of said defendant, and a stockholder therein as aforesaid, the plaintiff purchased of said Robert B. Moores ninety-one shares of the capital stock in said corporation, and paid therefor the sum of ninety-one hundred dollars in money to him, and the said Robert B. Moores did, at the same time, as cashier and stockholder, represent that he had, in consideration of said purchase and payment by the plaintiff, assigned and transferred upon the books of said bank ninety-one shares of stock to the plaintiff, and thereupon the said G. Volney Dorsey as president and the said Robert B. Moores as
11 cashier of said bank issued to the plaintiff a certificate, in the usual form of a certificate of stock in said corporation, for

ninety-one shares of said stock, of the par value of $100.00 for each share, which certificate was in the words and figures following, viz:

The Citizens' National Bank of Piqua,

(Stamp.) No. 56. state of Ohio. 91 shares.

This is to certify that Mrs. Carrie A. Moores is entitled to ninety-one shares of one hundred dollars each of the capital stock in the Citizens' National Bank of Piqua, transferable only on the books of the bank, in person or by attorney, on the surrender of this certificate.

Piqua, O., July 15, 1867.

(Signed) G. VOLNEY DORSEY,
President.

(Signed) ROBERT B. MOORES,
Cashier.

That the plaintiff relied upon the representations of said Robert B. Moores, as cashier and officer of the defendant: that the said certificate was duly issued, and that the stock had been duly transferred by said Robert B. Moores to the plaintiff on the books of said bank, and said plaintiff relied upon said certificate of stock which she received as genuine and valid for what it purported to be, and plaintiff alleges that the signatures of the said G. Volney Dorsey, as president, and of said Robert B. Moores, as cashier of the de-
12 fendant, to the said certificate were genuine, and that the same conforms in every respect to the usual form of certificate by which the defendant was accustomed to evidence the ownership of stock to its stockholders.

And the plaintiff further alleges that the said ninety-one shares of stock had not been transferred to the plaintiff by the said Robert B. Moores at the time of the issuing of said certificate to the plaintiff as aforesaid, as represented by said Robert B. Moores, as cashier of said defendant as aforesaid, and that the said representations of the said Robert B. Moores, as cashier of said defendant, were false.

And the plaintiff further says that she believed that all the said representations of Robert B. Moores, cashier of the defendant as aforesaid, were true, viz., that the ninety-one shares of stock had been transferred on the books of said corporation to the plaintiff, and stood in her name as owner; that the said certificate of stock was authorized by the said corporation and was valid, and that she was recognized as a stockholder for said amount of stock by the defendant until the first day of January, A. D. 1873, or after that day, when she first learned that the defendant disputed the validity of said certificate of stock, denied that any transfer of stock had been made to her upon its books, and refused to recognize her as an owner of stock in said corporation.

13 And the plaintiff further says that after the issuing to the plaintiff of said certificate as aforesaid, the defendant permitted the said Robert B. Moores to make on its transfer book

transfers of all the stock owned by him or standing in his name as owner upon the books of said corporation to other persons, leaving no stock on said books in the name of said Robert B. Moores to be transferred to said plaintiff, and none standing on its books in the name or to the credit of said plaintiff, and the defendant has refused and now refuses to recognize the plaintiff as owner of said stock or any part thereof, or to recognize the validity of said certificate.

And the plaintiff says that by means of the said fraudulent conduct of the said Robert B. Moores, as officer and cashier of the defendant, in issuing said certificate for stock without a surrender of any certificate for stock represented thereby, and without any transfer to the plaintiff of any stock on the books of the said corporation, or any power of attorney authorizing such a transfer, and by the negligence of the defendant in permitting said acts to be done by its said cashier and officers, the plaintiff has lost the said sum of $9,100 paid by her for said certificate of stock, which certificate is invalid and worthless in her hands.

Plaintiff on the day of , 1873, requested the defend-
14 ant to repay or reimburse to her said amount of $9,100, or to recognize the validity of said certificate of stock, and the defendant refused to pay the same or any part thereof, or to recognize said stock as valid.

The plaintiff says that she has sustained the loss of said sum of ninety-one hundred dollars through the negligence of the defendant and the fraud of its agent Robert B. Moores as above stated, to the damage of the plaintiff in the sum of $9,100, for which amount, with interest thereon from the day of , A. D. 1873, she prays a judgment against said defendant.

A. TAFT & SONS AND
M. C. SHOEMAKER,
Att'ys for Pl'ff.

STATE OF OHIO, } ss.
Hamilton co., }

Caroline A. Moores, being duly sworn, says that she is plaintiff in this action; that she has heard the above amended petition read and knows its contents, and that the same is true as she verily believes.

CAROLINE A. MOORES.

Sworn to before me and subscribed in my presence this 11th day of February, A. D. 1874.

CLINTON KIRBY,
Notary Public for Hamilton co., Ohio.

And afterwards, to wit, on the 12th day of February, in the
15 year last aforesaid, came the said defendant by its said attorneys, and filed in the clerk's office of the said court its certain

motion to compel election, clothed in the words and figures following, to wit:

Motion to compel election.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

Now comes the defendant and moves the court to make the following orders:

1st. To require the plaintiff to elect whether she will proceed upon the ground that she became the holder of genuine stock in defendant by virtue of her purchase from R. B. Moores, and was subsequently injured by the transfer of his shares to other persons, or upon the ground that the certificate set forth in the petition was invalid at the date of said purchase, and that the defendant is liable therefor on the ground of negligence, said claims as they now appear in the petition being inconsistent and contradictory.

2d. To require the plaintiff to strike from her petition all matter relating to the alleged ownership by R. B. Moores of shares in defendant, and the subsequent transfers thereof, such matter being irrelevant.

3d. To require the plaintiff to make her petition more
16 definite and certain by setting forth the particular act or acts, or omission or omissions of duty upon the part of defendant constituting negligence upon defendant's part.

MATTHEWS, RAMSEY & MATTHEWS,
Att'ys for Def't.

And afterwards, to wit, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and seventy-five, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Journal Entry.—Leave to Amend Petition.

Caroline A. Moores
vs.
Citizens' National Bank of Piqua, Ohio. } 1734. Money.

On motion to the court it is ordered by the court that the plaintiff have leave to file a second amended petition herein forthwith, and the same is accordingly filed, to which the defendant by its attorneys except, which second amended petition is clothed in the words and figures following, to wit:

Amended Petition.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

17 The plaintiff by leave of court and by way of an amended petition states that the defendant is a corporation duly incor-

porated under the laws of the United States; that the defendant from the time of its incorporation in the year 1864 to the present time has had its banking house in the city of Piqua, in the state of Ohio, and has had and kept its transfer office for the transfer of its stock therein; that on the fifteenth day of July, A. D. 1867, and prior to that time, G. Volney Dorsey was president and Robert B. Moores was cashier of the defendant, and that they were charged with the keeping of its transfer books and the issuing of certificates of ownership of stock in said corporation.

That the limitation of the capital stock of said corporation was one thousand shares of one hundred dollars per share.

That soon after the creation of the corporation, and about the time of the organization of said corporation, in the year eighteen hundred and sixty-five, the entire amount of the capital stock, viz., one thousand shares, or one hundred (100,000) thousand dollars, was taken and the money paid to the corporation therefor, and certificates issued to the stockholders therefor; that the said Robert B. Moores at the time represented himself to the plaintiff as an owner of a large amount of stock in said corporation, and appeared upon the books of said corporation as the
18 owner of more than ninety-one shares of said capital stock, of the value of $100.00 each share; that on the 15th day of July, A. D. 1867, while the said G. Volney Dorsey was president and the said Robert B. Moores was cashier of said defendant, and a stockholder therein as aforesaid, the plaintiff purchased of said Robert B. Moores ninety-one shares of the capital stock in said corporation, and paid therefor the sum of ninety-one hundred dollars in money to him, and the said Robert B. Moores did at the same time as cashier and stockholder fraudulently represent that he had, in consideration of said purchase and payment by the plaintiff, assigned and transferred upon the books of said bank said ninety-one shares of stock to the plaintiff, and thereupon the said G. Volney Dorsey as president and the said Robert B. Moores as cashier of said bank issued to the plaintiff a certificate, in the usual form of a certificate of stock in said corporation, for ninety-one shares of said stock, of the par value of $100.00 for each share, which certificate was in the words and figures following, viz:

The Citizens' National Bank of Piqua,

(Stamp) No. 56. state of Ohio. 91 shares.

This is to certify that Mrs. Carrie A. Moores is entitled to ninety-one shares, of one hundred dollars each, of the capital stock in the Citizens' National Bank of Piqua, transferable only on the
19 books of the bank, in person or by attorney, on the surrender of this certificate.

Piqua, O., July 15th, 1867.

(Signed) ROBERT B. MOORES, *Cashier.*

(Signed) G. VOLNEY DORSEY, *President.*

That the plaintiff relied upon the representations of said Robert B. Moores as cashier and officer of the defendant; that the said certificate was duly issued, and that the stock had been duly transferred by said Robert B. Moores to the plaintiff on the books of said bank, and said plaintiff relied upon said certificate of stock which she received as genuine and valid for what it purported to be, and plaintiff alleges that the signatures of the said G. Volney Dorsey, as president, and of said Robert B. Moores, as cashier of the defendant, to the said certificate were genuine, and that the same conforms in every respect to the usual form of certificate by which the defendant was accustomed to evidence the ownership of stock to its stockholders.

And the plaintiff further alleges that the said ninety-one shares of stock had not been transferred to the plaintiff by the said Robert B. Moores at the time of the issuing of said certificate to the plaintiff as aforesaid, as represented by said Robert B. Moores as cashier of said defendant as aforesaid, and that the said representations of the said Robert B. Moores, as cashier of said defendant, were false and fraudulent.

20 And the plaintiff further says that she believed that all the said representations of Robert B. Moores, cashier of the defendant as aforesaid, were true, viz.: That the ninety-one shares of stock had been transferred on the books of said corporation to the plaintiff and stood in her name as owner; that the said certificate of stock was authorized by the said corporation and was valid, and that he was recognized as a stockholder for said amount of stock by the defendant until the first day of January, A. D. 1873, or after that day, when she first learned that the defendant disputed the validity of said certificate of stock, denied that any transfer of stock had been made to her upon its books, and refused to recognize her as an owner of stock in said corporation.

And the plaintiff further says that after the issuing to the plaintiff of said certificate as aforesaid, the defendant fraudulently permitted and procured the said Robert B. Moores to make on its transfer book transfers of all the stock owned by him, or standing in his name as owner upon the books of said corporation, to the said G. Volney Dorsey, president of the said defendant, for the benefit of said defendant, leaving no stock on said books in the name of said Robert B. Moores to be transferred to said plaintiff, and none standing on its books in the name or to the credit of said plaintiff, and the

21 defendant has refused and now refuses to recognize the plaintiff as owner of said stock, or any part thereof, or to recognize the validity of said certificate.

And the plaintiff says that the facts that no transfer had been made to the plaintiff on the transfer book of the defendant at the time when said certificate of stock numbered 56 was issued and delivered to her, and that the same was not authorized by the corporation or recognized by it as valid, and that said stock, standing in the name of the said Robert B. Moores, was transferred on the book

of transfer of said defendant to the president of said defendant, were fraudulently concealed from the plaintiff by the defendant through its cashier, the said Robert B. Moores.

Plaintiff further states that she was aware of no circumstances calling for inquiry on her part upon the subject until after the first day of January, A. D. 1873.

And the plaintiff says that by means of the said fraudulent conduct of the said Robert B. Moores, as officer and cashier of the defendant, in issuing said certificate for stock, without a surrender of any certificate for stock represented thereby, and without any transfer to the plaintiff of any stock on the books of the said corporation, or any power of attorney authorizing such a transfer, and by
22 the defendant so fraudulently permitting and procuring said acts to be done by its said cashier, the plaintiff has lost the said sum of $9,100.00, paid by her for said certificate of stock, which certificate is invalid and worthless in her hands.

Plaintiff on the day of , 1873, requested the defendant to repay or reimburse to her the said amount of $9,100.00, or to recognize the validity of said certificate of stock, and the defendant refused to pay the same or any part thereof, or to recognize said stock as valid.

The plaintiff says she has sustained the loss of said sum of ninety-one hundred dollars through the fraud of the defendant and its agent, Robert B. Moores, as above stated, to the damage of the plaintiff in the sum of $9,100.00, for which amount, with interest thereon from the day of , A. D. 1873, she prays a judgment against said defendant, or such other relief as to the court shall seem meet.

A. TAFT & SONS AND
M. C. SHOEMAKER,
Att'ys for Pl'ff.

STATE OF OHIO, }
Hamilton county, } *ss.*

Caroline A. Moores, being duly sworn, says that she is plaintiff in this action; that she has heard the above-amended petition read, and knows its contents, and that the same is true, as she verily believes.

CAROLINE A. MOORES.

23 Sworn to before me and subscribed in my presence this 18th day of February, A. D. 1875.

CLINTON KIRBY,
[SEAL.] *Notary Public for Hamilton county, Ohio.*

And afterwards, to wit, on the 18th day of March, in the year last aforesaid, came the said defendant by its said attorneys, and filed in the clerk's office of said court its certain motion to compel election and make more definite and certain, clothed in the words and figures following, to wit:

Motion to compel election, &c.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

1. Now comes the defendant and moves the court to require the plaintiff to elect whether she will proceed against the defendant for permitting genuine stock of R. B. Moores, purchased by her, to be transferred to other persons, or upon the ground that the certificate issued to her was fictitious, and did not convey to her the title to any stock in defendant.

2. Defendant moves the court to require the plaintiff to make her petition more definite and certain by showing whether she became a stockholder by virtue of her contract with R. B. Moores, or whether said Moores delivered to her a false and fictitious
24 certificate.

3. The defendant moves the court to order the plaintiff to strike from her petition, the same being irrelevant—

1. All of the 8th paragraph beginning with the words "and the plaintiff further says," and ending with the words "or to recognize the validity of said certificate."

2. All of the 11th paragraph, beginning with the words, "and the plaintiff says," and ending with the words, "invalid and worthless in her hands."

3. The statements, wherever they occur, to the effect that G. Volney Dorsey was president and R. B. Moores cashier of defendant, and also the copy of the certificate issued to the plaintiff, said matters being irrelevant, argumentative, and mere matters of evidence.

MATTHEWS, RAMSEY & MATTHEWS,
Attorneys for Defendant.

And afterwards, to wit, on the 18th day of March, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Journal entry.—Motion overruled.

Caroline A. Moores
vs.
Citizens' National Bank, Piqua, O. } 1734. Money.

25 This day came the parties, by their attorneys, and this cause came on to be heard upon the defendant's motion to require plaintiff to elect and to make more definite and certain her amended petition, and was argued by counsel and submitted; on consideration whereof the court overrules said motion, to which the defendant excepts.

And afterwards, to wit, on the 18th day of March, in the year last aforesaid, came the defendant, by its said attorneys, and filed in the

clerk's office of said court its certain demurrer to plaintiff's second amended petition herein, clothed in the words and figures following, to wit:

Demurrer to 2nd am'd petition.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

Now comes the defendant and demurs to the second amended petition of the plaintiff, and assigns the following grounds of demurrer:

1st. The action is not brought within the statutory period allowed for the bringing of such actions, to wit, the period of four years from the date of the injury alleged in said petition.

2nd. Said petition does not state facts sufficient to consti-
26 tute a cause of action in favor of the plaintiff and against the defendant.

MATTHEWS, RAMSEY & MATTHEWS,
Atty's for defendant.

And afterwards, to wit, on the 20th day of March, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

J'rn'l Entry.—Demurrer Overruled.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

This day came the parties, by their attorneys, and this case came on for hearing upon the defendant's demurrer to the petition herein, as amended, and was argued by counsel and submitted; on consideration whereof the court find said demurrer not to be well taken, and overrules the same, to which the defendant excepts. And defendant has leave to file an answer within ten days. Which said answer, filed the 24th day of March, in the year last aforesaid, is clothed in the words and figures following, to wit:

Answer.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

27 1. Now comes the defendant and says that the plaintiff's alleged cause of action did not accrue within four years next preceding the filing of her first amended petition on her ortginal petition, said defendant claiming that the date of filing said first amended petition should be regarded as the date of the commencement of the action. Defendant denies that plaintiff was ignorant of

the facts set forth in her petition, if said facts existed at any time time after they occurred, and denies that the plaintiff was ignorant of facts which called upon her to inquire as to the validity of the certificate held by her until Jan'y 1st, 1873, or any other date after July 15th, 1867.

2. For further answer to the said petition the defendant says that on the 15th day of July, 1867, the plaintiff, with her husband, entered into a contract with R. B. Moores, who was the brother-in-law of the plaintiff, of which the following is a true copy:

"For value received, namely, the sum of ninety-one hundred dollars, Robert B. Moores has assigned and transferred to Caroline A. Moores ninety-one shares of stock of the Citizens' National Bank of Piqua, Ohio.

"Now, it is agreed that the said Caroline A. Moores shall, upon demand by Robert B. Moores or his assigns, re-assign to the
28 the said R. B. Moores the said stock for the same amount; and it is also agreed that, whenever the said Caroline A. Moores shall require it, the said Robert B Moores shall purchase the said stock for the same amount; and it is also agreed that, whenever the said Caroline A. Moores shall require it, the said Robert B. Moores shall purchase said stock at the amount aforesaid, and pay the same to her in cash; and in the meantime it is agreed, and the said Robert B. Moores and William B. Moores do hereby guarantee and assure to said Caroline A. Moores an annual dividend upon said stock of not less than ten per cent. upon the par value of said stock, namely, ninety-one hundred dollars; which guaranty shall be performed and fulfilled at the end of each year herefrom, or at the time of each dividend declared, if such dividend shall be declared oftener than once a vear, and all deficiencies in said dividend shall be made good at the time of such repurchase or transfer to R. B. Moores.

"In witness whereof the said Caroline A. Moores, and J. B. C. Moores, her husband, and Robert B. Moores and William B. Moores hereunto set their hands on this 15th day of July, 1867.

(Signed) "CAROLINE A. MOORES.
"J. B. C. MOORES.
"ROBERT B. MOORES.
"W. B. MOORES."

{ 5-c. int. rev. stamp. Hinnewell, Moores and Hukill, Cincinnati, O. }

29 This defendant knew nothing of said agreement and had no interest in or connection therewith. In pursuance of said agreement, John B. C. Moores, the husband of the plaintiff, paid the sum of ninety-one hundred dollars unto Wm. B. Moores, his father and the father of R. B. Moores, to be used for the benefit of said Wm. B. and R. B. Moores, and it was so used. Said sum of money was the property of said plaintiff. Subsequently said W. B. Moores, who had regularly paid the interest upon said sum to plaintiff, paid the said principal sum of ($9,100) ninety-one hundred dollars, where-

upon said R. B. Moores became entitled to take up said paper purporting to be a certificate of stock.

3. For a third defense to the petition of the plaintiff the defendant says that on the 15th day of July, 1867, the plaintiff, with her husband, John B. C. Moores, entered into the written contract with Wm. B. Moores and R. B. Moores, which is set forth in the above second cause of defense; that in pursuance of said contract said R. B. Moores delivered to the plaintiff a paper purporting to be a certificate of defendant that plaintiff was the owner of ninety-one shares of stock in the defendant, being the paper referred to in the petition. A true copy of said paper is set forth in plaintiff's petition. In pursuance of said agreement plaintiff paid said sum of ninety-one hundred dollars. Defendant admits that R. B.
30 Moores was its cashier at the date of said paper, and that G. Volney Dorsey was its president at said date, and that the genuine signatures of said persons appear upon said paper; but the defendant says that said paper was executed and delivered to plaintiff by said R. B. Moores without the knowledge or consent of said G. Volney Dorsey, or any other officer of defendant, and that neither said Dorsey or this defendant had any interest in or connection with said transaction.

Defendant further says that its entire capital stock had been taken long prior to July 15, 1867, and that transfers were being made from time to time, and that the certificates of stock required the signatures of both the president and the cashier; that the transfer-book of defendant contained printed certificates of stock, with blank spaces for the name of the holder, the number of shares, the number of the certificate, the date of issue, and the names of said president and cashier; that the said G. Volney Dorsey, president of defendant, signed a number of said blank certificates, intending that, as persons who had purchased stock should present their certificates for transfer, the said Moores should fill up the necessary blank or blanks, append his own signature, and make the transfer, issuing the new certificate in exchange for the old one then and there to be surrendered. Said Dorsey was, in so doing, actuated
31 by a desire to accommodate persons desiring such transfers, and who might otherwise be delayed in awaiting his signature in the event that he should be absent from the banking house when such transfers should be applied for.

Defendant says that it was upon one of the blanks aforesaid that the said R. B. Moores, in violation of his duty to this defendant, wrote the pretended certificate which he delivered to plaintiff.

Defendant further says that according to the rules and usages of defendant, at and before the date aforesaid, no one could procure a certificate of stock in defendant without the contemporaneous surrender of a certificate of stock for an equal amount for cancellation.

Defendant further says that prior to the said 15th day of July, A. D. 1867, said R. B. Moores had been the holder of several certifi-

cates of stock in defendant, but that he had transferred said certificates to other persons who held all of them at that date, and that while they had not been transferred on the books of defendant the certificates were all held by persons other than said Moores, who had paid value for the same, and none of them, nor any interest therein, were ever afterward in the said R. B. Moores' pos-
32 session. Said stock was held at the date aforesaid as follows: $11,500 by the Merchants' Bank of Cincinnati; $5,000 by R. Wilson Lee, and $4,000 by John W. Snarnely.

Defendant further says that up to and subsequent to July 15, 1867, said R. B. Moores had borne and did bear a good reputation for integrity.

4. Defendant denies all allegations in the said second amended petition, except those distinctly admitted herein.

Wherefore defendant prays to be hence dismissed with its costs in this behalf expended.

MATTHEWS, RAMSEY & MATTHEWS,
Solicitors for Defendant.

STATE OF OHIO, }
County of ——, } *ss.*

G. Volney Dorsey, on oath, says that he is president of the defendant above named, and that the allegations of the foregoing answer are true, as he verily believes.

G. VOLNEY DORSEY,
Pres't.

Sworn to before me and subscribed in my presence this 23d day of March, A. D. 1875.

[SEAL.] S. B. GARVEY,
Notary Public.

And afterwards, to wit, on the 4th day of June, in the year last aforesaid, an entry was made upon the journal of said court
33 in said cause, clothed in the words and figures following, to wit:

J'rn'l Entry.—Default Set Aside.

Caroline A. Moores
vs. } 1734. Money.
Citizens' National Bank of Piqua, O. }

On motion to the court, it is ordered that the default herein be, and the same is hereby, set aside, and plaintiff has leave to file a a reply to the first and second grounds of defense, and a demurrer to the third ground of defense set up in the answer herein, and the same are accordingly filed.

Which said reply is in the words and figures following, to wit:

Reply.

Caroline A. Moores
vs.
Citizens' National Bank of Piqua, O. } 1734. Money.

First. Plaintiff, for reply to the first ground of defense in the answer of the defendant, says that at and prior to the fifteenth day of July, A. D. 1867, when the said certificate of the defendant for ninety-one shares of its stock was issued, as alleged in the petition, and from that time to the present the plaintiff was and has been a married woman, viz., the wife of John B. C. Moores, and under the disability of coverture.

34 And for second reply to said first ground of defense, plaintiff says that said cause of action did accrue within four years next preceding the commencement of this action.

Second. And for a reply to the second ground of defense in said answer contained, the plaintiff denies that, in pursuance of said agreement, John B. C. Moores, the husband of the plaintiff, paid the sum of ninety-one hundred dollars unto Wm. B. Moores, his father and the father of R. B. Moores, to be used for the benefit of the said Wm. B. and R. B. Moores, and that it was so used, or that the said sum of money, which is alleged by said defendant in said answer to be the property of the plaintiff, was ever paid by said Wm. B. Moores to plaintiff, or that the said R. B. Moores ever became entitled to take up said paper purporting to be a certificate of stock.

Wherefore plaintiff asks judgment against defendant, as before.

TAFT AND SONS, and
M. C. SHOEMAKER,
Atty's for Pl'ff.

STATE OF OHIO, }
Clark county, } *ss.*

Caroline A. Moores, being first duly sworn, says that she is plaintiff in above action, and that the foregoing reply is true, as she verily believes.

CAROLINE A. MOORES.

Sworn to before me and subscribed in my presence this 14th day of May, 1875.

35 T. C. GOODE,
[SEAL.] *Notary Public.*

Which said demurrer is in the words and figures following, to wit:

Demurrer.

Caroline A. Moores
vs.
Citizens' National Bank of Piqua, Ohio. } 1734. Money.

Plaintiff demurs to the third ground of defense in said answer

contained, for the reason that it does not state facts sufficient to constitute a defence.

TAFT & SONS AND
M. C. SHOEMAKER,
Att'ys for Pl'ff.

And afterwards, to wit, but on the same day, came the said defendant, by its said attorney, and filed in the clerk's office of said court its certain demurrer in the words and figures following, to wit:

Demurrer.

Caroline A. Moores
vs.
Citizens' National Bank of Piqua, Ohio. } 1734. Money.

Defendant demurs to the first and second replies to the first
36 ground of defense, on the ground that they do not constitute good replies to said defense.

MATTHEWS, RAMSEY & MATHEWS,
Attorneys for Def't.

And afterwards, to wit, on the 29th day of June, in the year of our Lord one thousand eight hundred and seventy-seven, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

J'rn'l Entry.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

This cause coming on to be heard upon the plaintiff's demurrer to third ground of defense contained in defendant's answer, and defendant's demurrer to plaintiff's first and second reply to first ground of defense in said answer, and having been argued by counsel and considered by the court, it is ordered that plaintiff's demurrer to the third defense be, and the same is hereby sustained, to which the defendant excepts; and that defendant's demurrer to plaintiff's first reply to first defense be sustained, to which plaintiff excepts; and, finally, that defendant's demurrer to plaintiff's second reply to first defense be, and the same is hereby, overruled; to which defendant excepts. Both parties are hereby allowed thirty days to plead.

37 And afterwards, to wit, on the 9th day of March, in the year of our Lord one thousand eight hundred and seventy-eight, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

J'rn'l entry.

Caroline A. Moores
vs.
Citizens' National Bank of Piqua, Ohio. } 1734. Money.

On motion to the court, it is ordered that the defendant have leave to file its certain amendment to its answer herein forthwith, and the same is accordingly filed.

Which amendment to answer is clothed in the words and figures following, to wit:

Amendment to the answer of defendant.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

Now comes the defendant, and by leave of court first had and obtained, files this its amendment to its answer heretofore filed, and prays that it may be received as a third cause of defense in lieu of the third cause of defense alleged in its original answer, to which demurrer has been sustained, to wit:

38 For a third defense to the said action the defendant says that it denies that the said D. Volney Dorsey had any connection with the transaction alleged in the petition; and denies that he issued to the plaintiff the certificate set forth in said petition; and denies that the said Robert B. Moores, as its cashier or in his official capacity, issued said certificate to plaintiff; it denies that said Robert B. Moores held any stock certificate in defendant on July 15th, 1867, or at any time thereafter; and it alleges that, according to the rules and usages of defendant, no one is and no one was at that date entitled to receive a certificate of ownership of shares therein without the surrender of a certificate of corresponding amount for cancellation, all of which was well known to plaintiff; and the defendant generally denies all allegations of fraud or negligence in the said second amended petition made and contained.

MATTHEWS, RAMSEY & MATTHEWS,
Att'ys for Def't.

STATE OF OHIO, } *ss.*
Hamilton co., }

C. B. Matthews, on oath, says that the allegations of the foregoing amendment are true, as he believes, and that he is one of the defendant's attorneys, no offices of defendant being within this county.

C. B. MATTHEWS.

Sworn to before me and subscribed in my presence this 9th day of March, A. D. 1878.

[SEAL.]

E. L. DE CAMP,
Notary Public, Ham. co., O.

39 And afterwards, to wit, on the 26th day of March, in the year last aforesaid, an entry was made upon the journal of said court, in said cause, clothed in the words and figures following, to wit:

Journal Entry.—Leave to Reply.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

On motion to the court, it is ordered that the default herein be, and the same is hereby, set aside, and the plaintiff have leave to file her reply herein forthwith, and the same is accordingly filed, which said reply is in the words and figures following, to wit:

Reply to Amend Answer.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

The plaintiff, by way of reply to the third ground of defense as alleged in the amended answer of defendant, wherein the said amended answer denies the allegation of the plaintiff in her petition, joins issue thereon, and wherein it alleges that according to the rules and usages of defendant no one is or was entitled to receive a certificate of ownership of shares therein without the surrender of a certificate of corresponding amount for cancellation, and that
40 the same was well known to plaintiff; the plaintiff denies the said allegations.

ALPHONZO TAFT, AND
M. C. SHOEMAKER,
Att'ys for Def't.

STATE OF OHIO, } *ss.*
Hamilton county, }

Caroline A. Moores, plaintiff in this case, makes oath and says that the statements of facts in the foregoing reply are true, as she believes.

CAROLINE A. MOORES.

Sworn to before me and subscribed in my presence this eighth day of March, 1878.

[SEAL.] FLORIEN GIAUQUE,
Notary public, Hamilton co., Ohio.

And afterwards, to wit, on the 13th day of December, in the year last aforesaid, an entry was made on the journal of said court, in said cause, clothed in the words and figures following, to wit:

Journal entry.—Verdict.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

This day came the parties, plaintiff and defendant, by their attorneys and (filed their written stipulation waiving a jury and) submitted this case to the court upon the issue joined. On consid-
41 eration whereof, the court find the issues to be in favor of the defendant, to which finding the plaintiff, by her attorneys, excepts and gives notice of a motion for a new trial.

And afterwards, to wit, but on the same day and in the year last aforesaid, an entry was made on the journal of said court in said cause, clothed in the words and figures following, to wit:

J'rn'l Entry.—Motion for new trial overruled.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

This day again came the parties by their attorneys, and thereupon this case came on to be further heard upon the motion of the plaintiff for a new trial, and was argued by counsel and submitted. On consideration thereof, the court do overrule said motion. Therefore it is considered that the defendant, the Citizens' National Bank of Piqua, Ohio, go hence without day and recover of the plaintiff, Caroline A. Moores, their costs in this behalf expended, taxed at $, and execution is awarded therefor; to which ruling and judgment of the court the plaintiff, by her attorneys, excepts, and presents to the court her certain bill of exceptions to the finding, ruling, and judgment of the court in this case, which is allowed by the court,
42 signed, sealed, and ordered to be made a part of the record in this case.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between Caroline A. Moores and the Citizens' National Bank of Piqua, a manifest error hath happened to the great damage of the said Caroline A. Moores, as by her complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid,

with all things concerning the same, to the supreme court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said supreme court to be then and there held, that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done to correct that error what of right and according to the laws and customs of the United States
43 should be done.

Witness the Honorable Morrison R. Waite, chief justice of the said supreme court, the 11th day of February, in the year of our Lord, one thousand eight hundred and seventy-nine.

[SEAL.] THOS. AMBROSE,
Clerk of the Circuit Court of the U. S., S. D. O.

(Endorsed:) United States circuit court; No. 1734; Caroline A. Moores *vs.* The Citizens' National Bank of Piqua; writ of error; a copy of the within writ of error lodged in this office February 11th, 1879; Thos. Ambrose, clerk U. S. circuit court, S. D. O.

THE UNITED STATES OF AMERICA, }
Supreme Court of the United States. }

To the Citizens' National Bank of Piqua, greeting:

Whereas Caroline A. Moores has obtained the allowance of our writ of error to the circuit court of the United States within and for the southern district of Ohio, directed to remove into the said supreme court to be holden at the city of Washington on the second Monday in the month of October next, the records of a certain plaint, process, proceedings, and judgment in an action of
44 money, wherein the said The Citizens' National Bank of Piqua in that action lately recovered against the said Caroline A. Moores judgment for costs, as by the said record in the said circuit court remaining appears, in which said record and proceedings and also in the rendition of a judgment thereupon manifest error hath intervened, as by the said The Citizens' National Bank of Piqua we are informed, and our said writ of error granted, issued, and allowed as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be. You are therefore hereby commanded and cited to be and appear before the judges of the said supreme court at the city of Washington, at the next term of said court, to be holden on the the second Monday in the month of October next, to have the errors aforesaid corrected.

Witness the Honorable Morrison R. Waite, chief justice of the United States of America, this 11th day of February, in the year of our Lord one thousand eight hundred and seventy-nine and of the independence of the United States of America the one hundred and third.

Attest: JNO. BAXTER,
Circuit Judge 6th Circuit U. S.

No justice of the supreme court being present.

(Endorsed:) U. S. supreme court; No. *No.* 1734; ci. c'rt;
45 Caroline A. Moores *vs.* The Citzens' National Bank of Piqua, Ohio; citation to defendant in error.

We hereby acknowledge service of the within citation.
Cincinnati, June 24th, 1879.

MATTHEWS, RAMSEY & MATTHEWS,
Att'ys for defendant in error.

Supreme Court of the United States.

Caroline A. Moores
vs.
The Citizens National Bank of Piqua, Ohio. } In error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-nine, viz: on the second Monday of October in said term, before the justices of the supreme court of the United States, at the capitol in the city of Washington, comes the said Caroline A. Moores, by her attorneys, A. Taft and M. C. Shoemaker, and says that in the record and proceedings aforesaid there is manifest error in this, viz: that the demurrer by the defendant to the first reply by the plaintiff to the first defense of the defendant was sustained; and in this, that the motion for a new trial was overruled; and in this, viz: that by the record aforesaid it appears that the judgment aforesaid was given for the said The Citizens' National Bank of Piqua against the said Caroline A. Moores; whereas,
46 by the law of the land the judgment ought to have been given for the said Caroline A. Moores against the said Citizens' National Bank of Piqua; and the said Caroline A. Moores prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that she may be restored to all things which she hath lost by occasion of said judgment, &c.

A. TAFT,
M. C. SHOEMAKER,
Att'ys for Plaintiff.

(Endorsed:) No. —; supreme court of the United States; Caroline A. Moores, plaintiff, *vs.* The Citizens' National Bank of Piqua, defendant; in errors; assignment of errors. A. Taft and M. C. Shoemaker, att'ys for plaintiff.

(Endorsement on cover:) No. 205; Caroline A. Moores, plaintiff in error, *vs.* The Citizens' National Bank of Piqua; S. Ohio C. C. U. S.; filed 2d July, 1879.

And afterwards, to wit, on the twenty-sixth day of June, in the year of our Lord one thousand eight hundred and eighty-two, there was filed in the clerk's office of the court aforesaid, a certain mandate from the supreme court of the United States, which said mandate is in the words and figures following, to wit:

47 *Mandate.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the southern district of Ohio, greeting:

Whereas lately in the circuit court of the United States for the southern district of Ohio, before you, or some of you, in a cause between Caroline A. Moores, plaintiff, and the Citizens' National Bank of Piqua, Ohio, defendant, wherein the judgment of the said circuit court, entered in said cause on the 13th day of December, A. D. 1878, is in the following words, viz:

"This day again came the parties by their attorneys, and thereupon this case came on to be further heard upon the motion of the plaintiff for a new trial, and was argued by counsel and submitted. On consideration thereof the court do overrule said motion. Therefore it is considered that the defendant the Citizens' National Bank of Piqua, Ohio, go hence without day and recover of the plaintiff, Caroline A. Moores, their costs in this behalf expended, taxed at $, and execution is awarded therefor," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the *Supreme Court of the* United States by virtue of a writ of error, agreeably to the act of
48 Congress in such case made and provided, fully and at large appears. And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-one, the said cause came on to be heard before the said supreme court on the said transcript of record, and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs; and that the said plaintiff, Caroline A. Moores, recover against the said defendants twenty dollars for her costs herein expended, and have execut therefor. And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with directions to award a new trial. 6th March, 1882.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Morrison R. Waite, chief justice of said supreme court, the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
Clerk of the supreme court of the United States.

49 And afterwards, to wit, on the seventh day of February, in the year of our Lord one thousand eight hundred and eighty-three, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry.—Trial.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

This day came the parties, by their attorneys, and thereupon to try the issue joined, a jury being called, came, to wit, Peter Breiver, Wm. Clevinger, Wm. Graham, W. H. McCurdy, M. E. Morgan, Walter O. Murphy, Charles L. Oldo, J. N Oren, Simon Taylor, William Thomas, Ambrose J. Trimble, and Philip Turpin, who were duly empanneled, sworn, and affirmed, well and truly to try the issue joined between the parties, and the testimony being finished, but the argument of counsel not being concluded, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the eighth day of February, in the year last aforesaid, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

50 *J'rn'l Entry.—Trial Concluded.—Verdict.*

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, O. } 1734. Money.

This day again came the parties, by their attorneys, and also the jurors heretofore empanneled, sworn, and affirmed herein, who, having heard the evidence, the argument of counsel, and the charge of the court, do find the issue to be in favor of the defendant; whereupon the plaintiff, by her attorneys, gave notice of a motion for a new trial.

And afterwards, to wit, on the tenth day of February, in the year last aforesaid, came the plaintiff, by her attorneys, and filed in the clerk's office of the court aforesaid her certain motion for a new trial in this cause, which said motion is in the words and figures following, to wit:

Motion for a New Trial.

Caroline A. Moores
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

Now comes the plaintiff in the above-entitled cause, and moves

the court herein to vacate and set aside the verdict of the jury herein, and to grant a new trial for the following reason, to wit:

First. That said verdict is not sustained by and is contrary
51 to the evidence, and is also contrary to law.

Second. That errors of law occurred at the trial in admitting and excluding evidence offered which the said plaintiff's counsel excepted to at the time.

Third. That the court erred in its findings and determination of the facts during the progress of the trial, and in its charge to the jury, and also otherwise erred in its charge and instructions to the jury.

Fourth. That the court erred in refusing to give to the jury the special charges as requested by the plaintiff's counsel.

Fifth. That the court erred in directing the jury to return a verdict for the defendant.

Sixth. Other errors apparent upon the record.

PAXTON & WARRINGTON AND
STALLO, KITTREDGE & SHOEMAKER,
Att'ys for Pl'ff.

And afterwards, to wit, on the fifth day of March, in the year last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry.—Motion for New Trial Overruled.

Caroline A. Moores
vs.
The Citizens' National Bank, Piqua, Ohio. } 1734. Money.

52 This cause coming on to be heard upon the motion of the plaintiff to set aside the verdict and for a new trial, and having been argued by counsel and considered by the court, it is hereby ordered that the same be overruled and that judgment be entered on said verdict against plaintiff and in favor of defendant, with costs; to which action of the court in overruling said motion and entering judgment for defendant as aforesaid the plaintiff then and there excepted. It is thereupon considered by the court that the defendant have and recover from the plaintiff its costs in this behalf expended, to be taxed, for which an execution is awarded. And thereupon the plaintiff presents her bill of exceptions in writing and asks that the same be signed and allowed and made part of the record in this cause, which is accordingly so ordered and done.

Which said bill of exceptions is in the words and figures following, to wit:

Bill of Exceptions.

United States circuit court, southern district of Ohio.

Caroline A. Moore
vs.
The Citizens' National Bank of Piqua, Ohio. } 1734. Money.

53 Be it remembered that this cause came on for trial at the February term, A. D. 1883, before the Hon. John Baxter, judge of said court, and a jury, and the plaintiff to maintain the issue on her part called John B. C. Moores, who, being first duly sworn, testified as follows:

Testimony of John B. C. Moores.

I live at Glendale, Ohio, and have lived there for twenty-five years; I am engaged in the manufacture of lime at Springfield, Ohio, with an office in Cincinnati.

Q. Tell us what you know of this transaction which resulted in the loan, as we claim, by your wife of some ninety-one hundred dollars, and getting in lieu thereof a certificate for ninety-one shares of the stock of the Citizens' National Bank of Piqua, Ohio?

A. July the 15th, 1867, is the date of the certificate; my wife had received from her attorney, Warner M. Bateman, $9,100, which had to be invested, and Robert and my father called to get the money, and got it by giving this certificate of stock; the money was originally my wife's, Mrs. Moores', who is plaintiff in this suit; a contract was entered into at the time as an additional guarantee for the $9,100, a copy of which contract is hereto attached, marked Exhibit "A," and made part hereof. (Plaintiff then offered in evidence,
as exhibit attached hereto and made part hereof as Exhibit
54 "B," the certificate of stock which was received and read in evidence, the signature being admitted to be genuine.)

Q. Will you explain the circumstances that led to the execution of this contract, Exhibit "A," and the delivery of this Exhibit "B," and why it was that this money was wanted, who wanted it, and from whom it was got?

A. I was in the firm of Moores and Hukel; Robert B. Moores, my brother, was cashier of this bank, and my father was in the lime business, and settling up the estate of James C. Moores, another brother; they wanted to get this money; Robert and father wanted to use it, and Robert wrote me a letter wherein he speaks about it; he knew the money was to be collected, and they wanted to get possession of it, a copy of which letter is attached hereto, marked Exhibit "C," and made part hereof, dated January 24th, 1867. (Plaintiff thereupon also offered in evidence as Exhibit "D," hereto attached and made part hereof, a letter dated Piqua, Ohio, July 15, 1867, signed by R. B. Moores; and also a letter dated July 18th, 1867, hereto attached and made part hereof as Exhibit "E," from Piqua, Ohio, signed R. B. M., the signatures being admitted.)

Q. Had any money been paid at the time the contract was signed?

55 A. No; I presume not, from this letter, since this one says "Enclosed contract of the 18th;" my recollection is that I had this certificate of stock; that it was received on the 16th; the money was paid on the 16th, I think; and the money was paid between that day and the letter of July, 18th; Mr. Bateman gave a check to my wife's order, and I deposited it in the Franklin Bank on July 18th, until we got this thing fixed up, so that I could pay out the money, and I paid it out; the check was in my wife's name, and I took it and deposited it; she endorsed it, and I took it to the Franklin Bank and deposited it in contemplation of this loan; I was at that time a member of the firm of Hunnellwell, Moores & Hukell, doing business on Main street in this city.

Q. Was there any idea of your having that money as yours for that transaction?

A. No, sir; there never was.

Q. Did your wife say anything about giving it to you?

A. No, sir; I did not want it; I did not ask for it; I had capital enough of my own in the business.

Q. I understood you to say that you did not need the money?

A. No, sir.

Q. You did this to assist your wife in perfecting her loan?

A. Yes, sir.

56 Q. For whose benefit was this done; your wife's?

A. Well, it was intended for my wife's as well as Roberts' and my father's.

Q. At that time what were your business relations with your father?

A. We were not together, that is not connected in business, but I was indebted to him in the sum of $21,000, which was evidenced in 1868, January first, by notes, as follows: To his order, payable five years after date, for $9,100.00, and a note for the balance, $12,569.45, was payable in five years at 10 per cent. interest; then, March 1st, he surrendered that note for note for three thousand dollars, payable three days after date, and a note for $9,569.45, and that note for $12,569.45 was surrendered; that note for $12,569.45 was to his order; after he surrendered it, I gave him the note for $3,000, which he passed to R. B. Moores, and the note of $9,569.45, with the other included, make up the amount; this note $9,100.00, was given Jan 1st, 1868, six months after this stock transfer, and it was an offset on account of stock as to interest; Robert was to collect the dividends on the bank stock, and I was to pay that much less; it was the same as if I had got it; my wife permitted me to use the interest, but not the principal; father died January 29th, 1870;

57 just before he died, I heard of the fraudulent character of this stock transaction; he told me; it was in his last sickness when he was confined to the house.

Q. Just before your father died?

A. Just before he died.

Q. How long before?

The COURT: What was the date?

A. Jan. 29th, 1870.

Q. How did you learn it?

A. Father told me it was in his last sickness; it was while he was confined to the house. There was some other stock issued in the same way that I never knew of.

Q. By your brother in this Piqua bank?

A. Yes, sir.

Mr. RAMSEY: I object to any further statement on that subject.

The COURT: I do not see that any of this is necessary in this case to make out the plaintiff's side of this case, if you show a loan. Here is money admitted to be her money. She has a check on a bank; she indorses that check to this man for collection, and he takes it and collects it, and deposits the money to his own credit, so far as I can see, without any authority. That does not change the title to the money, and it was all done for this transaction, and she loaned the money thereby.

Cross-examination:

58 Q. Mr. Moores, on the 15th of July, 1867, you owed your father more than $9,100, did you not?

A. The time this stock was issued was July, 1867, and January, 1868, is when I formed my new partnership with Hummerwell and Hukill. I owed him $13,000 on the 15th of July, about the time this paper was delivered, and about six months afterwards I gave my father a note for $9,100; put into such shape that it would not bear interest, my wife having given me the interest on this. I do not know what became of the $9,100 note; I presume it was destroyed by my father; I never paid it.

Q. Then in that way the $9,100 loaned to your father and brother was settled, so far as you were concerned, or as far as you had any power to settle?

A. No, sir.

Q. Well, you gave a note to your father, and you never paid it; on the contrary, he destroyed it?

A. Well, I presume so; I do not know but what it was lost.

Q. The certificate attached as Exhibit B is altogether in your brother's handwriting, so far as there is any handwriting at all, except Dr. Dorsey's signature?

A. Yes, sir.

Q. You acted for your wife in this transaction?

A. Yes, sir; as her agent, but she had full knowledge of
59 everything that was going on; and when she got the certificate she placed it with her brother, Frank H. Lawson.

Whereupon it is admitted by defendant's counsel that the signatures and seal on Exhibit B, the certificate hereto attached, are the

genuine signatures of the president, G. O. Dorsey, and the cashier, Robert B. Moores, and the genuine seal of the bank, and that everything else is in the handwriting of Robert B. Moores except the printed matter and the signature of Dr. Dorsey, as aforesaid.

And the plaintiff, further to maintain the issue on her part was sworn on her own behalf and testified as follows:

Testimony of Caroline A. Moores.

I am the plaintiff, and wife of J. C. B. Moores.

Question. Please tell the jury and court what you know about this transaction?

Answer. Well, my husband has told it already—that this ninety-one hundred dollars was mine, and Mr. Bateman got it from another suit, and then Mr. William Moores and Robert Moores wanted to use the money and it was loaned to them without interest, that is, the interest—my husband had the use of that. I never gave the principal to my husband. William B. Moores was the father and Robert B. Moores was the brother of my husband, and Robert B. Moores was the cashier of the bank. I received a certificate
60 of stock and a contract, and my husband took charge of them and gave them to my brother.

Q. When did you first learn that anything was wrong about the certificate?

A. Some time after Mr. William Moores' death, I do not remember how long; I did not know it before that. I think it was two or three years after his death. I do not remember how long it was before the suit was begun that I learned of it. It was not talked of long before that time.

Q. Have you ever been paid any of the money you loaned in the way you stated?

A. No, sir; I have not.

Q. Was there ever any settlement made by your permission or with your knowledge with Mr. William Moores, your father-in-law, of this matter or of the money you loaned?

A. I never talked with Mr. William Moores about it. I never authorized my husband to make any settlement with my father-in-law for the claim of $9,100.

Cross-examination.

Q. When did you first learn that he had made such a settlement?

A. Made what settlement?

Mr. WARRINGTON: I object to it. We deny any such settlement.

The COURT: Let the witness answer.

Mr. WARRINGTON: I will take an exception.

A. I never learned that they had and they never did.

Testimony of Frank Lawson.

FRANK LAWSON, being duly sworn in behalf of the plaintiff,
61 testified as follows:

Q. You are a brother, I believe, of Mrs. Moores?

A. Yes, sir.

Q. What, if anything, had you to do with the preparation of the contract? (Plaintiff's Exhibit "A.")

(Objection by Mr. Ramsey.)

The COURT: What do you want to draw out of the witness?

Mr. WARRINGTON: It is this; Mr. Lawson, who is the brother of the plaintiff, the owner of this money, had charge and took charge, so far as he possibly could, of this money, and in seeing to it that it was loaned with safety and in a manner to get it back, and it was at his suggestion that the contract was drawn up, and at his suggestion that the security was taken; all this being done for the protection of his sister and her property. I want to show that to negative this idea, that is being constantly pressed on the other side, that Mrs. Moores was suffering her property to go in that manner to heal up a sore in the Moores family.

The COURT: If she advanced the money, took that security, and entered into that contract it does not matter whether the suggestion came from her brother or an outsider; I cannot see that his suggestion of the fact makes any difference in the case; you can prove the
62 contract, the fact that your client loaned the money, and the presumption of law is that she was acting honestly; I do not see that it is important whether the suggestion came from this witness or not.

Mr. WARRINGTON: I will take an exception.

Q. After these instruments were executed—the contract and the certificate of stock—did you have them in your charge?

A. Yes, sir; in my possession for my sister, Mrs. Moores; I had them for several years, and gave them up, with reference to the commencement of this suit, about five years after the death of William B. Moores.

Deposition of Warner M. Bateman.

And thereupon the plaintiff, to maintain the issue on her part, offered in evidence the deposition of Warner M. Bateman, a copy of which is hereto attached and marked Exhibit G and made part hereof, execept that portion of said deposition in which witness says: "He understood that Robert B. Moores held stock in the Citizens' National Bank of Piqua and was a large stockholder.

The plaintiff, further to maintain the issue on her part, offered in evidence the orgaization certificate and the by-laws of the defendant corporation, which were admitted to be articles of association of the defendant, which were received in evidence, and copy of which is hereto attached, marked Exhibit "H," and made a part hereof.

63 It is admitted, and proof thereof is by defendant waived, that at the time of the acts complained of the defendant was, and still is, a national bank organized under the act of Congress known as the National Bank Act, approved June 3rd, 1864; that the certificate of stock upon which this suit is brought is in the usual form of printed certificates used by said defendant, and has thereon the genuine signatures of G. Olney Dorsey, who was the president; and Robert B. Moores, who was the cashier of said bank, and the genuine seal of said bank; that said Robert B. Moores was, at the time of the discovery of the character of the certificate, and still is, insolvent and unable to respond in damages or otherwise, and that the market value of said stock of said bank at the time of these transactions was ninety (90) per cent. of the par value thereof, and that said Robert H. Moores appeared by the books at that time to be the owner of some two hundred and seventy-five shares of the capital stock of said bank, of the par value of one hundred dollars each.

Plaintiff rested.

Deposition of H. B. Olmstead.

And thereupon the defendant, to maintain the issue on its part, first read in evidence the deposition of H. B. Olmstead, a copy of which is hereto attached, marked "Exhibit J," and made part hereof. And also called—

64 Dr. G. VALNEY DORSEY, who, being duly sworn, testified on behalf of the defendant, as follows:

Testimony of Dr. G. Valney.

Examined by Mr. RAMSEY:

Question. Where do you reside?

Answer. Piqua, Ohio.

Q. Were you the president of the Citizens' National Bank of Piqua, Ohio, in July, 1867?

A. Yes, sir.

Q. How long had you been president prior to that time?

A. I became president on the 1st of May, 1867.

Q. Is this your signature? (Showing witness the certificate in question.)

A. Yes, sir.

Q. When did you first know of the existence of that certificate?

A. I knew nothing of the existence of that certificate until in June, 1872.

Q. What book is that? (Showing witness book.)

A. That is the certificate book of the Citizens' National Bank of Piqua, Ohio.

Q. Do you know where that certificate came out of that book?

A. I see that certificate is numbered, in the handwriting of R. B. Moores, "56." Here is a stub also numbered, in the handwriting of

R. B. Moores, "56." I presume, therefore, and there is no doubt——

Mr. WARRINGTON: (Interrupting:) I object to the conclusion.

Q. State what it shows.

A. Well, it shows plainly——

Q. In whose handwriting is the word "destroyed?"

A. R. B. Moores' handwriting; also the word "destroyed."

65 Mr. RAMSEY: I offer that page; the stub as constituted in the book.

We will also offer the stubs "No. 55" and No. "57," in order to show that No. "56" comes in chronological order.

Q. You say that the first knowledge you had was in June, 1872?

A. Yes, sir; in June, 1872.

Q. Had the bank any interest in the transaction in 1867?

A. No, sir.

Q. Had it any interest?

A. No, sir.

Mr. WARRINGTON: I object to that.

By the COURT:

Q. Do you know that any officer of the bank had knowledge of this fraudulent transaction, except the cashier, up to 1872?

A. No, sir.

Mr. WARRINGTON: I will take an exception.

Q. How did your name get on that certificate and for what purpose?

A. I signed a few certificates in the bank, to be used if they were needed when I was absent from the bank.

The COURT: You say these were for use on occasions in your absence?

A. Yes; if there was occasion for their use in my absence.

Cross-examination by Mr. WARRINGTON:

Q. You are a practicing physician, and were in 1867?

A. Yes, sir.

66 Q. Had you any other certificates book than this one in 1867?

A. No, sir; the bank had no other.

Q. Had the bank any different book from this—any different certificate book?

A. No, sir.

Q. Did this commence with the organization of the bank?

A. It did.

Q. Has it ever had another one since?

A. No, sir.

Q. This is the only certificate book that the bank has ever had?

A. Yes, sir.

Q. Where was this book kept in the bank?

A. Kept in the safe of the bank.

Q. How many certificates would you sign in advance and leave

with the cashier? What I mean by advance is in advance of the then existing necessity for their use.

A. I never signed more than two or three certificates.

Q. What you mean by that is, two or three in advance of the present necessity for their use?

A. Not until those were used up, and then two or three more.

Q. Just whenever the cashier told you it was necessary?

A. Yes; whenever he thought it was absolutely necessary.

Q. When he would tell you to do it?

A. Then I would do it.

Q. How long had you been president in 1867?

A. I became the president on the first day of May, 1867.

Q. How long did Robert B. Moores continue its cashier
67 after the issue of this certificate of stock, dated July 15th, 1867?

A. My recollection is that he went out in 1869.

Q. What time?

A. I cannot remember the day.

Q. Mr. Dorsey, Robert B. Moores was your son-in-law, was he not?

A. Yes, sir.

Q. Will you examine this (showing witness paper) and state whether that is from the minutes of your bank?

A. Yes, sir.

Mr. WARRINGTON: I offer this paper in evidence.

The COURT: Well, I will rule it out; you may show negligence connected with this transaction, or you may show a ratification of it.

Mr. WARRINGTON: I except the court's ruling.

(Said paper is hereto attached, made part hereof, marked Exhibit "K.")

Q. Do you say that certificates were surrendered and given to the bank at all times and in every instance that a certificate was issued.

Mr. JOHNSON: I understand that the court had ruled that very thing out.

The COURT: I understand it in that way.

Mr. WARRINGTON: Do you rule that out?

The COURT: Yes, sir.

Mr. WARRINGTON: I except to the court's ruling; we expect the witness to state that there were one or two other instances in which stock was issued without any certificate being surrendered.

The COURT: Do you expect to prove that the bank sanc-
68 tioned anything of the sort?

Mr. WARRINGTON: I expect to prove by him that they settled these transactions.

The COURT: You expect to prove that the bank settled it?

Mr. WARRINGTON: Yes, I do.

Q. Now, who was the custodian of the stock certificate book, and the transfer ledger, if that is what you call those books?

A. The officers of the bank, of course.

Q. Whom?
A. The president and cashier.
Q. Where were these books kept?
A. In the safe of the bank.
Q. Who had the keys of the safe?
A. Only the president and cashier, and the assistant cashier, and vice president, and the officers of the bank.
Q. The directors, I suppose, could go in and see them when they wanted to?
A. They had that privilege, of course.
Q. Always open to the inspection of the directors?
A. Yes, sir.
Q. Doctor, how was it that you ascertained that this certificate No. 56 was issued; when did you learn it?
A. I stated that this morning; in June of 1872; I am positive about that because I have the letters.
Q. From whom?
A. I have the letters; I remember that from reading it yesterday; I had forgotten the fact a gentleman, son-in-law of mine, was
69 informed by John B. C. Moores in 1872, in June, that he had a certificate of stock on our bank; as I had inquired of Moores very particularly in regard to certificates of stock falsely issued.
Q. When you say you inquired of Moores, do you mean the cashier?
A. I mean the cashier.
Q. Now go on.
And he assured me that there was no spurious certificates issued, except those of which we had knowledge in 1869; so that along in June, 1872, John B. C. Moores informed Dr. Parker that he had a certificate for nine thousand dollars on the bank, and when Parker came to me and stated it to me—he stated it to me in June, 1872—I immediately addressed a letter to John B. C. Moores, which is dated June 25, 1872.
Mr. WARRINGTON: I now offer in evidence a letter from G. Volney Dorsey to John B. C. Moores, dated at Piqua, Ohio, June 25th, 1872.
(Which said letter was read in evidence and is hereto attached marked Exhibit "L," and made part hereof.)
Q. You wrote that letter to Mr. Moores?
A. Yes, sir; on the 25th of June, 1872, which is the first I heard of it.
Q. Did you get any answer to that?
A. Yes, sir: I refer to the answer that Mr. Moores gave
70 me in my letter of June 25th.
Q. Have you got that answer?
A. No, sir; I have not.
Q. Where is it?
A. I presume that I might find it among my papers at home; I

presume that I could find the letter; refer to that in my letter of July 5th.

Q. Well, we will read that letter. Do you recollect what the contents of that letter from Mr. Moores to you were?

A. I think it was a statement of the number and amount of the certificate.

Q. Read that letter. (Giving witness paper.)

A. (Witness reading.) "Piqua, Ohio, July 5, 1872. John B. C. Moores, esq. My dear sir: There is no such certificate as mentioned in yours of June 27th on our books. No. 56 is marked on the stub in our certificate book "destroyed" in R. B. Moores' handwriting. Your wife's name was never entered among our stockholders and the certificate is a fraud. We never heard of this certificate until you mentioned it to Dr. Parker, who first informed me of it. Very truly yours, G. Volney Dorsey."

Q. Now, have you ever paid any dividends on that stock?

The WITNESS: Certainly not.

Q. Why not?

A. Because it was never on our books.

Q. Do you recognize that as stock of your bank?

71 A. No, in no way, shape, or form.

Q. Did you ever allow her to vote?

A. She never asked to vote; if she had asked to vote she would not have been allowed.

Q. Have you the stock ledger here?

A. No, sir.

Q. Where is it?

A. At home; there are no other books of the bank here except that.

Q. I wish you would examine these stubs and tell the court whether or not they run through consecutively, so far as the numbers are concerned.

Mr. RAMSEY: I object to it as irrelevant.

The COURT: The book is in evidence.

Mr. WARRINGTON: It is understood that this book is offered in evidence, and identified by the signature of clerk of the court as Exhibit "M" and made part hereof, and by consent of parties it may be used in the Supreme Court of the United States without being attached to the bill of exceptions.

Q. Were you familiar with the cashier's handwriting?

A. Yes, sir.

Q. When I say cashier I refer to Robert R. Moores.

A. Yes, sir.

Q. Whose handwriting is that? (Indications in stub book.)

A. I think Mr. Moores'.

Q. I call attention to the stub next preceding the one last referred to, which has on it in pencil the words "Blank signed by

72 Megrue," followed by the word "destroyed," in pencil. Whose handwriting is it?

A. Well, sir, I cannot say; I was going to say that I would not be willing to say positively that either of those are Mr. Moores' handwriting; these stubs seem to belong to the days of the Megrue ownership of the bank.

Q. How do you know that this stub to which you refer is the stub of the certificate in this case?

A. I don't know it in any way at all, except they are both numbered 56 and in the handwriting of R. B. Moores; that is all the evidence.

Q. How many different persons wrote in this book, after your connection with the bank, when stock was transferred?

A. From the time of my connection up to the present time?

Q. No, sir; take it from the time this cashier was connected with it; that will cover it.

A. Well, no person wrote in that book, I think, with the exception of R. B. Moores and J. R. Allen, who was the assistant cashier.

Q. Were all the certificates issued and signed by yourself and the cashier during Mr. Moores' time in the bank?

A. Certainly they were; they would not have been considered certificates without the signatures.

73 Q. Please state in detail what, if any, other issues of fraudulent certificates bearing the ——— of yourself as president and Robert B. Moores as cashier were made between May 1st, 1867, and July 15th, 1867.

The COURT: Do you expect to show that the officers of the bank in any way recognized the action of the cashier in issuing this stock here?

Mr. WARRINGTON: Only so far as I stated it before, as being generally their negligence.

The COURT: Then I rule it out. (To which plaintiff's counsel excepted.)

Q. I repeat the same question with reference to the dates commencing July 14th, 1867, and ending July 14th, 1869, during the time of Robert B. Moores' connection with the bank as cashier, and expect to prove by the answer to this question, as well as the other, that there were several such transactions; but I cannot say that the officers of the bank other than the cashier had actual knowledge at the time of the fact.

The COURT: Or subsequently recognized it.

Mr. WARRINGTON: Only the subsequent recognition in this resolution we have offered.

The COURT: Do you expect to show any more than that?

Mr. WARRINGTON: No, sir.

The COURT: Then I rule it out.

Mr. WARRINGTON: I except to both rulings.

74 *Testimony of Robert B. Moores.*

And also ROBERT B. MOORES, who, being duly sworn, testified on behalf of the defendant as follows:

Examined by Mr. RAMSEY:

Question. Were you the cashier of the Citizens' National Bank of Piqua, Ohio, in 1867?

Answer. I was.

Q. What is your business now?

A. I am now engaged in quarrying stone.

Q. Do you recognize that signature? (Showing certificate of stock.)

A. Yes, sir; I do.

Q. It is all your handwriting—all except the name of Dorsey?

A. Yes, sir.

Q. Can you recognize the stub from which that certificate was taken?

A. I would know it by the writing. (Counsel showing witness certificate book.) Yes, that is my writing. It was not torn off, there was a large pair of scissors used in cutting them off.

Q. What interest had the bank in the transaction between yourself and Mrs. Moores, the plaintiff?

Mr. WARRINGTON: I object to it.

The COURT: It is competent to show whether the bank had an interest.

Mr. WARRINGTON: I will take an exception.

A. It had not.

Q. In what manner was that certificate issued to Mrs. Moores, the physical act and fact, connected with its its issue? How did you come to get Mr. Dorsey's signature to that certificate?

75 A. Well, I could not say now, it has been so long ago. It might have been signed in the book in blank, or I might have cut it out.

Q. Now, what was the transaction as between yourself and the members of your family who entered into the contract?

Mr. WARRINGTON: I object to that.

The COURT: I think that is a matter that has been inquired into all the way through; the loaning of the money is a part of the transaction.

Mr. WARRINGTON: Note an exception.

Q. Did you get any of the money?

A. No, sir.

Q. Was any used to pay your debts?

A. No, sir.

Q. Did the bank get any of it?

A. No, sir.

Q. On the 15th of July, 1867, what genuine certificates of stock did you hold in point of fact?

A. Well, when I bought out the Megrues all the certificates bought of William and Newt. Megrue were issued, and when they were issued to me the amounts was made out by J. R. Allen, and I signed them and Dr. Dorsey signed them. When they were made

out they were deposited with Mr. C. B. DeCamp, a partner of the firm.

The COURT: State generally the facts whether you had hypothecated the certificates.

A. I had done it, or authorized to be done.

The COURT: Well, had it been done?

76 A. I think it had; I am very positive of that.

The COURT: Do you know?

A. Well, if I had the books of the firm I could tell the date.

Q. The question is not the date, but whether it had been done. Prior to July, 1867, you had put them in the hands of the firm, with authority to use them.

A. Yes, sir.

Q. Did you ever get the certificates again yourself?

A. No, sir.

Q. Do you know into whose hands they passed?

A. Some passed into A. G. Burt & Co.'s hands.

Q. How much?

A. I do not recollect the amount; some four or five thousand dollars.

Mr. WARRINGTON: I object to this testimony. I do not see the purpose.

The COURT: Let the witness answer.

Mr. WARRINGTON: Note an exception.

Q. Now, who else held any?

A. The Merchants' National Bank had ten or eleven thousand dollars—two certificates.

Q. Burt had one?

A. Yes, Burt had one.

Q. There was something about Jason Evans?

A. Jason Evans had one, I think, for seven thousand dollars, and a man named Garmany had one.

Q. Do you recollect how much that was?

A. I think four thousand dollars.

Q. Those certificates you have mentioned make up the two
77 hundred and seventy-five shares, and they were in five certificates.

A. Yes, sir.

The COURT: At the time you issued this certificate to the plaintiff, did you return any other certificate that you held in the bank?

A. No, sir; I did not. I did not have it.

The COURT: Did you issue this certificate without any authority?

A. Yes, sir; except so far as I was concerned myself.

The COURT: No authority from the bank to you?

A. No, sir.

The COURT: Did the other officers know of the fact?

A. No, sir.

The COURT: Did the bank get any benefit from that transaction?

A. No, sir.

Cross-examination by Mr. WARRINGTON:

Q. So far as the books of the bank were concerned, on July 15th, 1867, how many shares of stock did you own?

A. Acccording to the books of the bank I do not think that there was any of that stock I mentioned to the Merchant's National Bank, Burt & Co., and to Evans transferred; Evans' might have been transferred. The book would tell the date of that. I think Evans was the only one that sent the stock to be transferred. Mr. Evans was then a partner with Mr. Hughes.

78 Q. You were the owner of the share so far as the stock was concerned on the books of the bank?

A. Well, except as to this indebtedness.

Q. Did not the books show you to be the owner of over two hundred shares of stock on July 15th, 1867?

A. I presume that the face of the books did.

Q. On the very day that you issued this certificate of stock No. 56 your books showed you to be the owner of over two hundred shares of stock?

A. Well, I could not state whether that was the fact or not.

Mr. RAMSEY: Take it as admitted.

Mr. WARRINGTON: That is admitted.

Q. Now you say you had some of that stock hypothecated?

A. Yes, sir.

Q. You say that you had authorized it to be hypothecated?

A. I brought it down here and left it with Caleb B. De Camp, who was a member of the firm of Moores and Hukill, to use it for the firm.

Q. That is your handwriting, is it not? (Showing paper.)

A. Yes, sir.

Mr. WORTHINGTON: This is a letter dated July 15th, 1867.

Mr. RAMSEY: That is in evidence.

Q. In the very first sentence is this: "Herewith I hand you stock transferred to Carrie." Now, you wrote that to your brother.

A. Yes, sir.

79 Q. What did you mean by transferring to her if you did not transfer it?

A. I wrote it to her in that way, because he said he would always take care of that stock, and that the stock was to be put on the books of Moores & Hukill.

Q. Did you transfer it?

A. No, sir.

Q. It was not true?

A. No, sir. I did not transfer it.

Q. Mr. Moores, whom did you converse with about this loan?

A. With John Moores exclusively, and my father.

Q. And your father?

A. Yes. I do not think I think I ever said a word to Mrs. Moores.

The COURT: Was this transaction at Cincinnati or Piqua?

A. It was done at Cincinnati altogether, with the exception of issuing this stock, which was done at the bank.

Q. You and your father were in business together?

A. No, sir; we were not.

Q. Were you not both interested in real estate on Baymiller street?

A. That is all; but we were not in business.

Q. Do you say this all went to the benefit of your brother?

A. Yes; he owed father at the time some twenty thousand dollars; he had been first in the firm of Hunnewell, Moores & Hukill. Myself and James were in there. I sold two-sixteenths to my brother, and my brother James sold one-sixteenth. The old firm was ——— and William Anderson, and they had to use more money the first year. When the firm expired, father came in,
80 and they made the capital sixty thousand dollars, giving myself credit and charging father; and that is the reason he was given that money. It was a part payment of that twenty thousand dollars.

Q. You testified before by way of deposition?

A. Yes, sir.

Q. Let me read to you, and ask you what you mean by this:

4th Question. "Where was the agreement made; was it in writing, and who were present when it was entered into?"

Answer. The agreement was in writing. It was made here in Cincinnati by Mr. Bateman, who wrote the contract out. I do not think any one was present when I signed the contract. Each signature was written separately. His wife's signature was on it when I signed it. I did not sign it on the day it was dated. It was after that day. John was probably present when I signed it.

5th Question. Who received the money?

Answer. My father, William H. Moores.

Question. What use did he make of the money, and did you receive any of it?

Answer. He used it in settling this indebtedness, which he had assumed, of James C. Moores, so far as it went. I did not get any of it."

81 Q. Now, if he used this money to settle James' claims will you explain to this jury how John B. C. Moores got the benefit of this?

A. Because he was owing father, and father was afraid that some person would attach this money. Father in his troubles in business had settled upon mother several time a sum of money; in fact Mr. Bateman went out and set apart a certain amount of money for mother; he in changing around finally changed it over to mother. They were living on Ninth street then; and she took that interest of eight or nine thousand dollars and paid it out in the house.

Q. Was this testimony true, as you delivered it in this deposition?

A. What do you mean; that I got no benefit from that money?

Q. Was the testimony that I read just a moment ago true?

A. Yes, sir.

Q. You knew that this was John's wife's money?

A. Yes; I knew it was his wife's money.

The COURT: Did you know it belonged to your sister-in-law?

A. Yes; I knew it belonged to her.

The COURT: Your brother wanted to get the use of the money?

A. Yes, sir.

The COURT: And you entered into the arrangement?

A. My brother wanted to get the use of it through my father; it was him indirectly.

Q. You knew this was his wife's money?

A. Yes, sir.

The COURT: And this arrangement was made to obtain the money from her?

A. Yes, sir.

82 The COURT: And then the money was paid to your father?

A. Yes, sir.

The COURT: And you issued this certificate without any knowledge of the bank, and in the belief that he would take up this certificate and protect you?

A. Yes, sir.

Q. I want to ask Mr. Moores a question that was ruled out. What other cases or instances of the issuing of stock similar to what you have described concerning this occurred in your bank?

A. No similar transaction to that.

The COURT: For your own private use, without having a genuine certificate?

A. Well, there was one case in which I sold some stock to the doctor, and he afterwards did not get the certificate, or brought it back, I could not say which, and stated he did not get the certificate and came down and paid the balance of the money for which it was liable.

Q. Have you mentioned all?

A. And I issued a certificate for that Megrue certificate which I did not get of Megrue, and which he bought.

Mr. RAMSEY: I object to it.

Mr. WARRINGTON: I can show that there are still other transactions.

The COURT: And suppose you do, you only show that he has done something that was wrong. The plaintiff can recover for that reason; and therefore rule it out.

83 Mr. WARRINGTON: I will take an exception.

Q. How do you know that stub No. 56 in the stock certificate book is the one corresponding to this certificate?

A. I told you before that the only reason is is that it is in my handwriting, and the No. 56 corresponds with it.

Q. Is that all the reason?

A. That is all I know now.

Q. Were there not two numbers 56?

A. Not that I know of.

Q. If you so testified was it true? I read you from your previous examination: "Was this the only certificate of the No. 56 that was issued?" You say: "I do not know positive, of my own knowledge; I have heard since I left the bank that there was another of the same number issued." "Did you issue any other of that number?" "I could not say whether I did or did not, from my memory." "Please to look at stub No. 56 on the stock book, and which you have stated you suppose to be the stub of the certificate delivered to the plaintiff, and say whether it appears to be numbered in the proper order, as compared with those after it and before it in the book?" "It seems to be numbered in the proper order as to those after it, but not as to those before it, for I find No. 35 after No. 44; it follows 55 and precedes 57." Was that correct at that time?

84 A. I presume it was, but you must bear in mind, and if you will look at that book, that nearly every certificate is made out in J. R. Allen's handwriting; he was then the assistant cashier, and was a good penman, and I had him make them out.

Q. You were in charge of this bank as cashier?

A. I was in charge as other officers.

Q. How much of the time was Dr. Dorsey absent?

A. He was frequently called out.

Q. Did you or not have personal supervision and charge of that bank while acting as cashier?

A. I could not, because I was away too much; I was closing up my business here, and I would be away a great deal.

Q. How much of the time did you attend to the business?

A. Well, I suppose I would be there three, or four, or five days in some weeks, and in some weeks not more than two or three days.

Q. How long did you continue cashier after this transaction?

A. I left the bank July 15th, 1869, in my recollection.

Q. When did you become cashier?

A. On the 1st of May, 1867.

Q. What arrangement was made between you and your brother John concerning the dividends to be paid upon this share of stock?

Mr. RAMSEY: I object to to it.

The COURT: Did you pay dividends on that stock?

A. I was never asked for any dividends that I know of.

85 Mr. WARRINGTON: I expect to prove that this witness testified before that he had an arrangement with John whereby he would take care of these dividends through his father, and that it could be fixed up in that way. John owed his father an indebtedness which bore ten per cent. on ninety-one hundred dollars, and that interest was to be drawn or treated as dividends upon this stock.

The COURT: The contract calls for ten per cent. guaranteed.

Mr. WARRINGTON: It is a verbal arrangement to which I now refer.

The COURT: I rule out any further inquiry about that verbal agreement.

Mr. WARRINGTON. I will take an exception.

Mr. WARRINGTON. They attempt to show that this ninety-one hundred dollars was a settlement between John and his father, whereas the other testimony of some of the witnesses shows that he was providing for these dividend himself.

The COURT: There is no testimony in the case which the court will submit to the jury that John ever settled this. It seems to me that you are getting away from the material issue.

Mr. RAMSEY: The defendant rests.

86 And thereupon, by way of rebuttal, the plaintiff recalled John B. C. Moores, who testified on behalf of the plaintiff, as follows:

Examined by Mr. WARRINGTON:

Q. State whether or not you ever said to Robert B. Moores that you wanted this money of your wife's for your benefit or anything to that effect.

Mr. RAMSEY: I object to the question.

The COURT: The liability of the defendant is exactly the same whether he said it or not, but you may answer the question.

A. I never said anything of the kind.

Q. Did you ever say to Robert B. Moores that if he would issue this certificate of stock and execute the contract made in connection with it, that you would take care of it and protect him, or words to that effect?

A. I never said anything of the kind.

Q. Can you recollect, if so, please state, the content of a letter written by you to G. Volney Dorsey concerning this stock when he informed you of the report that your wife held stock?

A. Well, I just told him the amount of stock and the number.

Q. Describe the stock.

A. Yes, that is about all, I presume.

Q. And the ownership of your wife?

A. Yes, sir.

Q. What, if anything, did you know of any rule requiring stock to be surrendered at that bank before new stock was issued?

87 Mr. RAMSEY: I object to the question.

Mr. WARRINGTON: We expect to show that the witness had no knowledge upon the subject whatever.

The COURT: That may be very true; they have made no proof, and it does not make any difference. I understand that she did not, in fact, have any personal knowledge of the fraud of the transaction.

Mr. WARRINGTON: This was as to the requirement of a surrender of the certificate.

Mr. JOHNSON: We only claim that she had the knowledge which the law gives her by having the certificate in her possession.

Mr. WARRINGTON: I offer to make the proof.

The COURT: I understand that to be conceded.

Mr. JOHNSON: We do not claim that she had any other knowledge than that which was obtained by a reading and possession of this certificate.

Mr. WARRINGTON: I want the record to show that Mr. and Mrs. Moores had no knowledge of any rule requiring the surrender of a certificate of stock before another one should be issued.

The COURT: It would seem that when the court states a fact, that gentlemen ought not to treat the court as though they supposed some advantages were to be taken of them, or that it were necessary for the court to repeat it a half a dozen times. It is enough to say that fact is understood and so conceded by counsel.

88 Mr. WARRINGTON: We rest.

And this was all the evidence offered in the cause.

Charge of the court.

And thereupon the court charged the jury as follows:

GENTLEMEN OF THE JURY:

This controversy is one in which a loss occasioned by the wrongful act of a third party must be borne either by the plaintiff or defendant to this action. There is no substantial disagreement between opposing counsel as to the facts. Robert B. Moores, at the time the defendant's cashier, desired to borrow money from the plaintiff. She was willing to make the loan upon satisfactory security. Moores represented he owned a considerable amount of the defendant's capital stock, and he promised to transfer ninety-one shares of one hundred dollars each on the books of the company to the plaintiff and issue a certificate to her therefor. He thereupon made out a certificate in the usual form, in which it was certified that the plaintiff was entitled to ninety-one shares, of $100.00 each, of the capital stock of said bank, transferable onto books of the bank by the plaintiff in person, or by her attorney, on the surrender of said certificate. And upon the faith of this certificate, which the plaintiff then believed to be valid evidence of ownership of the stock called for therein, supplemented by the contract of the 15th of July, 1867, which has been

89 read in evidence, the plaintiff loaned or advanced Moores $9,100. It is conceded that this money so advanced belonged to her, and that she did not possess any personal knowledge of the fraudulent character of said certificate of stock. But, it is now admitted that although the books of the defendant showed Moores was the owner of two hundred and seventy-five shares of the capital stock of the defendant at the time, the same had been transferred and hypothecated by him to others, and that, in point of fact, he did not own any stock. But, in order to supply the security for the loan according to his promise and agreement, he, without authority and without any consideration to the bank, and without any knowledge

on the part of any officer or director thereof, fraudulently made and issued the certificate to the plaintiff, offered in evidence, and delivered the same to her, and at the same time, and as a part of the same contract, the parties entered into the aforesaid agreement, of the 15th of July, 1857, in which it is stipulated that the plaintiff should, upon demand by said Robert B. Moores or his assigns, reassign the same to said Moores. And further, if the plaintiff should require it, said Moores agreed to repurchase the said stock at its par value, and in the meantime to guarantee an annual dividend
90 thereon of not less than ten per cent.

This certificate is verified by the genuine signature of the defendant's then president and cashier. It is futhermore conceded that defendant and all its officers, except its cashier Moores, who withdrew therefrom in July, 1869, were ignorant of the existence of plaintiffs said certificate until June, 1872, when a knowledge thereof was communicated to the defendant's officers, in 1872; they insisted that it was fraudulent and spurious and not obligatory upon the bank, and the defendant has hitherto declined to recognize plaintiff as a stockholder, denied to her all the rights pertaining to that relation, and refused to account to or pay her anything therefor. It further appears, that no part of the money loaned or advanced by the plaintiff as aforesaid for said certificate has been repaid to her. Moores, who perpetrated the wrong, is, it is said, insolvent and per consequence, the loss, as we have already said, must be sustained by either the plaintiff or defendant. It must fall wherever the law, upon the foregoing statement of the facts, requires it to be placed. Now if we accept the plaintiff's theory of the law, to wit, that a party purchasing or loaning money in good faith upon the certificate of stock, bearing the genuine signatures of the corporate officers authorized and charged with the duty of transferring stock on the books of the company and issuing certificates of owner-
91 ship therefor, in the usual form and regular in all respects upon its face, without any knowledge of its fraudulent or spurious character, is entitled to recover from the corporation the damages sustained by reason of the spurious, fraudulent, and invalid character of such certificate, this court, as at present advised, entertains the opinion, and so instructs you, that no such recovery can be had upon the facts proven in this case. If a recovery could be had in any case, it could only be had by an innocent holder for value. The plaintiff is, in the ordinary sense, an innocent holder; that is, she relied on Moores' representations, believed he owned stock in the defendant's corporation, relied, no doubt, in good faith, upon his promise to have ninety-one shares thereof transferred to her, and accepted the same in the belief that the certificate was issued by authority in the due course of his business in lieu of stock belonging to him, and which he had surrendered and caused to be cancelled.

But it must be borne in mind that Moores, in his efforts and negotiations to borrow money, was acting for himself and not as cashier of the bank. His representations that he was the owner of a large

amount of defendant's capital stock were not official representation, and cannot, upon any principles of law known to this court, bind
92 the bank. They were but the representations of an individual contending with pecuniary embarrassments, and if believed to be true and acted upon by the plaintiff, and loss resulted therefrom, the bank is in no way responsible for the same. As cashier, he was but the agent of the defendant and could only bind it within the scope of his authority and in the regular course of business. But Moores, when assuming to borrow money either for himself or his friends, was acting for himself in a matter in which the bank had no interest, and it therefore cannot be affected by anything that he may have promised or said as an inducement to make the loan.

If plaintiff relied on such representations, as she evidently did, and the same turned out to be false, the defendant is under no legal obligation to make good the loss.

This much will not be seriously questioned by the plaintiff's counsel. But they say that as cashier he was entrusted with the custody of the defendant's certificate book, containing blank certificates signed by the president, and that he was, as cashier, authorized to accept and cancel surrendered certificates, transfer the same, and issue new certificate to the transferees; and that such service came within the scope of his agency; that the issuance by him of
93 the certificate held by the plaintiff, and constituting the foundation of this action, was an official act within the scope of his special duties; and that he, having afterwards obtained a loan or advance of money from the plaintiff upon the faith of its regularity and genuiness, and in ignorance of its spurious and fraudulent character, perpetrated a wrong for which the defendant, the bank, who clothed him with the power to inflict the injury, is justly and legally amendable.

It may, as we have already said, for the sake of the argument, be conceded that money loaned or advanced by an innocent party, upon the faith of such certificate, could be recovered from the corporation. But is the plaintiff, in the eye of the law, such an innocent person? These terms in law have a technical meaning. Ignorance of facts which the law under the circumstances of the particular case requires a party to know, does not excuse the want of diligence or throw around the party the immunity which attaches to persons exempt from all laches and blame. In other words, if there is any fact which, in contemplation of law, puts a party on inquiry, and he fails to make the investigation which, if made, would develop the fraud, he is to be treated in all respects as if he had actual knowledge of the facts. There is another principle of law applicable to this case
94 an agent cannot lawfully act in the same matter for his principal and for himself in cases wherein their interests are adverse to each other. To illustrate: if a casher were to draw a check in his own favor, and then, as cashier, certify for the bank that the check was good, and he had funds in the bank to meet it, the bank would be bound to pay it upon proper endorsement and presentation.

But if, in point of fact, he had no funds in the bank to check upon, the bank could not be held liable upon his certificate, although made in his capacity of cashier of the bank, that the check was good, notwithstanding the party suing the bank may have, in good faith, bought the check in the belief, predicated on the cashier's certificate, that the check was drawn against a fund in the hands of the bank, and that it was good and would be paid on proper presentation. Yet, if such check was drawn in favor of a stranger and certified by the cashier to be good, his bank would be legally bound and liable thereon. The reason why the bank is not liable for a check drawn by a cashier in his own favor and certified to be good, even in the hands of one buying it in good faith and in ignorance of any fraud, has been stated. An agent cannot act for his principal and
95 himself in matters in which they have adverse interests, and every one purchasing such a check is upon its face admonished by the law of the necessity of making inquiry into the fairness and good faith of the transaction, and if he does not do this, however honestly he may rely on the integrity of the agent, the loss must be sustained by him.

Now, is this principle applicable to the facts of this case? Keep in mind that the plaintiff was dealing with Moores, the cashier, in his individual capacity. She agreed to loan her money to him on condition that he would have a certificate issued to her for ninety-one shares of the defendant's capital stock. He undertook to do this. The undertaking was for his own benefit in order to enable him to consummate the loan. He had possession of the bank's book of certificates. One of the certificates contained therein was signed by the president in blank, and left with him for use when occasion required it. He took this, and without authority, without consideration, and without the knowledge of any other officer of the bank, filled it up in the plaintiff's name and delivered it to her, with the contract of the 15th of July, 1867, in relation thereto, as a security for the repayment of the money loaned. This certificate made by Moores for his own benefit is filled up in his handwriting and signed by him as cashier.

96 Now, while the plaintiff relied upon his honesty and believed that the certificate had been issued in good faith and by competent authority, she knew that in issuing it Moores was acting for himself; that the certificate was issued by him for his own benefit, to be used for the purpose and in the manner stated. This knowledge, we think, was enough to put her on inquiry. If she had made the inquiry, which the law as well as prudential reasons required under the circumstances of this case, Moores' fraudulent actions would have been developed and the loss resulting therefrom avoided.

Agents entrusted with important interests and invested with large powers have many opportunities for an abuse of their trusts. Nevertheless, if their fraudulent acts are within the scope of their agencies, and a loss must result either to their principals or to an innocent per-

son who relied upon their action in the belief that the same was valid and done in good faith, the law would cast the loss upon the principal who selected and placed the agent in the position to do the wrong, and not on the innocent party. But if the complaining party knows when accepting a check, certificate of stock, receipt, or other acquittance or obligation issued or executed by the agent in the name of the principal that he was acting in regard thereto for
97 himself, and in his own interest, such knowledge would put such party on inquiry and divest him or her of the legal rights and incidents pertaining to that class of persons.

The plaintiff having had knowledge of the fact, that is, of the fact that the agent was acting for himself in the matter of the transfer of this stock, that Moores, upon whom she relied to have the stock transferred to her, was acting for himself, as well as in his capacity of cashier, that is, acting for the bank upon one side and for himself on the other side in reference to the matter of issuing this certificate, she is not, in the judgment of this court, an innocent holder of the stock, and, as the certificate was issued without authority, and in fraud of the rights of the bank, the court instructs you to return a verdict for defendant.

And the plaintiff, by her counsel, at the close of said charge, and before the cause was submitted to the jury, excepted thereto as follows:

1st. To the instruction by the court to the jury that the plaintiff was not entitled to a verdict, but that the verdict must be for the defendant.

2nd. To so much thereof as assumes that the plaintiff admitted that the cashier was not in fact the owner of the stock in the bank, or that he had transferred and hypothecated such stock at the
98 time of the execution and the delivery of the certificate of stock in question herein to the plaintiff.

3d. To so much thereof as assumes that the plaintiff admitted that the defendant bank's officers, excepting its cashier, were ignorant of the existence of plaintiff's certificate of June, 1882.

4th. To so much thereof as assumed a state of facts, and concluding the same with the instruction that no recovery could be had upon such facts.

5th. To so much thereof as states the rule of law defining and concerning an innocent holder for value.

6th. To so much thereof as holds that the cashier, Moores, acted for himself and not as cashier of the bank in executing and issuing, and in the transactions connected with the plaintiff's said certificate of stock, and in holding that the bank could not be affected by what he, said cashier, may have promised or said in connection therewith; and also in holding that the plaintiff relied solely upon the representations made by the cashier individually, as distinguished from the representations contained in the certificate of stock itself.

7th. To so much thereof as states the rule of law concerning the power of cashiers, and especially the cashier in this case, to bind the

bank, and to so much thereof as holds that the defendant was
99 not bound in this case by the acts of its cashier.

8th. To so much thereof as states the rule of law whereby parties, and especially this plaintiff, are put upon inquiry in transac-with banks.

By the COURT: Well, gentlemen, the court instructs you that defendant is, upon the evidence adduced, entitled to your verdict.

And thereupon the jury returned a verdict for the defendant pursuant to the instructions and charge of the court, and plaintiff then filed her motion in writing, asking the court for the reasons therein set forth, to set aside said verdict, and for a new trial; which said motion the court did overrule and rendered judgment on said verdict for said defendant with costs; to which action of the court in overruling said motion for a new trial and in entering judgment for the defendant, the plaintiff then and there excepted, and presented this her bill of exceptions in said cause, and prayed that the same may be signed, sealed and allowed, and made part of the record herein, which is accordingly so ordered and done.

March 5th, 1883.

[SEAL.] JOHN BAXTER,
Circuit Judge, &c.

100 *Exhibit "A."*

For value received, namely, the sum of ninety-one hundred dollars, Robert B. Moores has assigned and transferred to Caroline A. Moores ninety-one shares of stock of the Citizens' National Bank of Piqua, Ohio.

Now it is agreed that the said Caroline A. Moores shall, upon demand by Robert B. Moores, or his assigns, re-assign to said R. B. Moores the said stock for the same amount. And it is also agreed that whenever the said Caroline A. Moores shall require it, the said Robert B. Moores shall purchase said stock at the amount aforesaid, and pay the same to her in cash. And in the meantime it is agreed, and the said Robert B. Moores and William B. Moores do hereby guaranty and assure to said Caroline A. Moores an annual dividend upon said stock of not less than ten per cent. upon the par value of said stock, namely, ninety-one hundred dollars, which guaranty shall be performed and fulfilled at the end of each year herefrom, or at the time of each dividend declared, if such dividend shall be declared oftener than once a year, and all deficiences in said dividends shall be made good at the time of such re-purchase or transfer to R. B. Moores.

In witness whereof the said Caroline A. Moores and J. B. C. Moores, her husband, and Robert B. Moores and William B.
101 Moores hereunto set their hands on this 15th day of July, 1867.

(Signed) CAROLINE A. MOORES,
J. B. C. MOORES,
[STAMP.] ROBT. B. MOORES,
W. B. MOORES.

Exhibit "B."

The Citizens' National Bank of Piqua,

(Stamp.) No. 56. state of Ohio. 91 shares.

This is to certify that Mrs. Carrie A. Moores entitled to ninety-one shares of one hundred dollars each of the capital stock of the Citizens' National Bank of Piqua, transferable on the books of the bank, in person or by attorney, on the surrender of this certificate.

Piqua, O., July 15th, 1867.

ROBT. B. MOORES, *Cashier.*
G. VOLNEY DORSEY, *President.*

Exhibit "C."

Moores & Co., importers and dealers in saddlery, hardware, No. 89 Main street, Cincinnati, Jan'r'y 24th, 1867.

JOHN: I saw Mr. Bateman this morning. He says the court confirmed the sale, but they have given him till Wednesday to
102 redeem it, but has to pay 2 or 3 thousand dolls. more than Bitto. I expect it is about closed up now. All well. Father says he directed the paper he was going to send you to me, and I expect you did not get it at Piqua after all. Yours,

R. B. MOORES.

"Exhibit D."

CITIZENS' NATIONAL BANK OF PIQUA,
PIQUA, O., *July 15th*, 1867.

JOHN: Herewith I hand you the stock transferred to Carrie. I don't know what day I will be down, and you can keep the contract there, and I will sign it the first time I am down. I will have to take a receipt for the stock from father, to file with my papers, to show where the stock is gone to. All well; may be down any day.

Y'rs, R. B. MOORES.

"Exhibit E."

CITIZENS' NATIONAL BANK OF PIQUA,
PIQUA, O., *July* 18, 1867.

103 JOHN: Herewith I hand you the contracts, signed as requested; will be down next week. There is a wholesale and retail queensware house being stocked here in the large store between Griggs & Williamson's wholesale grocery store, by some house in Dayton; probably you can find out and sell a good bill to them. I will try and find their names and send them to you. I have since seen Sherman, who says they are 2 young men in Wolf's store in Dayton, named Stribling or Strickling; don't know which. They think it is only Wolf backing the concern. You know Wolf, and

if you see him speak to him, so he will do their business here with us. All well.

Y'rs, R. B. MOORES.

"Exhibit G."

WARNER M. BATEMAN, being first duly sworn, deposes and says, as follows?

Question. State your name, age, residence, and occupation.

Answer. My name is Warner M. Bateman; my age is 46 years; reside in Glendale, Ohio; am an attorney at law.

Q. Did you draft the contract now shown you, marked Exhibit A, attached to and made part hereof?

A. It is in my handwriting, and prepared by me as the attorney of Mrs. Caroline A. Moores.

Q. State what you know in regard to the money that passed
104 at the time of the contract and whose fund it was?

A. Some considerable time previous to this I had been employed by Frank Lawson on behalf of his sister, Caroline A. Moores, to forcelose a mortgage upon the property of John W. Caldwell for an amount, interest and all, near the sum described in the paper. Shortly previous to the execution of this paper—the exact time I am not able to state—I realized the amount of the mortgage, which was, as near as I can remember without having the papers before me, between $9,000.00 and $10,000.00. The money was paid to me, and I drew a check to the order of Mrs. Moores for the amount to which she was entitled. After delivering the check to J. B. C. Moores for his wife, I think on the same day, Mr. Lawson came to me in some excitement and complained of my paying the money to Mrs. Moores instead of to himself, and said he had given the claim to me to collect himself, but it belonged to his sister, as a part of the estate derived from her father, and that although he was not her guardian or trustee, he had had charge of her business affairs, and was anxious to save this fund from passing into the hands of W. B. Moores, then in embarrassed circumstances, and desired to save and secure it for her own use; I told him the check was payable to his sister's order. Very
shortly afterward Mr. Lawson returned to me and said that
105 it was all right, and, in substance, that satisfactory arrangements were made to secure the fund to his sister. What time elapsed between this conversation and making of this agreement I do not remember.

Exhibit H.

Organization certificate.

We, the undersigned, whose names are specified in article fourth of this certificate, having associated ourselves for the purpose of transacting the business of banking under the act of Congrers entitled "An act to provide a national currency secured by a pledge of

United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, do make and execute the following organization certificate.

First. The name of the association shall be "the Citizens' National Bank of Piqua."

Second. The said association shall be located in the city of Piqua, county Miami, and State of Ohio, where its operations of discount and deposit are to be carried on.

Third. The capital stock of this association shall be one hundred thousand dollars, ($100,000.00,) and the same shall be divided into one thousand shares, of one hundred dollars each.

106 Fourth. The name and residence of each of the shareholders of this association, with the number of shares held by each, are as follows:

(Here follows the names, number of shares, and residences, as above indicated, which by consent of parties are omitted.)

Fifth. This certificate is made order that we may avail ourselves of the advantage of the aforesaid act.

(Here follows the signatures of the subscribers, together with the certificate of acknowledgement before a notary public in usual form, which are by consent of parties omitted herefrom; said acknowledgment being duly signed and sealed.)

By-laws.

By-laws of the Citizens' National Bank of Piqua, O.; organized under the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864:

ELECTIONS.

SEC. 1. The regular annual meetings of the stockholders of this bank for the election of directors, shall be held at its banking-house on the second Tuesday of January of each year, between the hours of ten and four of said day, thirty days' notice of the time
107 and object of which meeting shall be given by the cashier of this bank, by publication in the Piqua Journal, and it shall be the duty of the board of directors, within one month previous to the time of said election, to appoint three stockholders to be judges of said election, who shall hold and conduct the same, and who shall, after the election has been held, notify under their hands, the cashier of the bank of the result thereof, and the names of the directors-elect.

SEC. 2. The cashier, upon receiving the returns of the judges of election as aforesaid, shall cause the same to be recorded upon the minute-book of the bank, and shall notify the directors elect of their elections, and of the time at which they are required to meet at the banking house of this bank for the purpose of organizing the new board. If at time fixed for the meeting of the directors-elect there

should not be a quorum present, the members present may adjourn from time to time until a quorum is obtained.

SEC. 3. If for any cause the annual election of directors should not be held on the second Tuesday of January, the board shall order the election to be held on some other day, of which special election notice shall be given in accordance with the requirements of the 10th section of the act, and judges appointed, and the returns made and directors-elect notified according to the requirements and provisions of sections one and two of these by-laws.

108

OFFICERS.

SEC. 4. The officers of this bank shall be a president, cashier, teller, book-keeper, and such other officers as may be from time to time required for the prompt and orderly transaction of its business.

SEC. 5. The president shall hold his office (unless he shall resign or become disqualified or be removed) for the current year for which the board, of which he shall be a member, was elected. In case a vacancy in the board of directors or in the office of president shall occur during any current year, it shall be filled by the board.

SEC. 6. The cashier and the subordinate officers shall be appointed to hold their offices respectively during the pleasure of the board.

SEC. 7. The cashier of this bank shall be responsible for all the moneys, funds, and valuables of the bank, and shall give bond, with security to be approved by the board, in the penal sum of and conditioned for the faithful and honest discharge of his duties as such cashier, and that he will faithfully apply and account for all such moneys, funds, and valuables, and deliver the same, on proper demand, to the order of the board of directors of this bank, or to the person or persons authorized to receive them.

109

SEC. 8. The president of this bank shall be responsible for all such sums of money and property of every kind as may be intrusted to his care or placed in his hands by the board of directors, or by the cashier, or otherwise come into his hands as president, and shall give bond in the penalty of $, with security to be approved by the board, conditioned for the faithful of his duties as such president, and that he will faithfully apply and account for all sums of money and other property of the bank that may come into his hands as such president, and pay over and deliver the same to the order of the board of directors or to any other person or persons authorized to demand or receive the same.

SEC. 9. The teller shall be responsible for all such sums of money, property, and funds of every description as may from time to time be placed in his hands by the cashier, or otherwise come into his possession as teller, and shall give bond, with security to be approved by the board, in the penalty of , conditioned for the honest and faithful discharge of his duties as teller, and that he will faithfully apply, account for, and pay over all moneys, property, and funds

of every description that may come into his hands by virtue
110 of his office as teller to the order of the board of directors aforesaid, or to such person or persons as may be authorized to demand and receive the same.

SEAL.

SECTION 10. The following is an impression of the seal adopted by the board of the bank:

[In circle:] Citizens' National Bank of Piqua, Piqua, Ohio.

CONVEYANCE OF REAL ESTATE.

SEC. 11. All transfers and conveyances of real estate shall be made by the bank and under the seal thereof in accordance with the orders of the board, and shall be signed by the president or cashier.

INCREASE OF STOCK.

SEC. 12. Whenever an increase of stock shall be determined upon in accordance with the provisions of the article of association of this bank, it shall be the duty of the board to notify all the stockholders of the same and to cause a subscription to be opened for such increase of capital. In the increase of capital each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for, according to his existing stock in the bank. If any stockholder shall fail to
111 subscribe for the amount of stock to which he may be entitled, the board of directors may determine what disposition shall be made of the privilege of subscribing for the unsubscribed stock.

BUSINESS OF THE BANK.

SEC. 13. The bank shall be open for business from 9 o'clock a. m. to 3 o'clock p. m. of each day of the year excepting Sundays and the days recognized by the laws of the state as national and religious holidays. There shall be a standing committee, to be known as the exchange committee, consisting of a president, cashier, and one director, appointed by the board every six months, to continue to act until succeeded, who shall have power to discount and purchase bills, notes, and other evidences of debt, and to buy and sell bills of exchange, and who shall at each regular meeting of the board make a report of the bills and notes discounted and purchased by them since their last previous report.

MINUTES.

SEC. 14. The article of association of this bank and the returns of the judges of the elections shall be recorded in the minute-book, in which shall also be recorded the proceedings of the board at all regular and special sessions. The minutes of each meeting shall be signed by the president and attested by the cashier.

112 TRANSFERS OF STOCK.

SEC. 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions

of the act, and a transfer-book shall be kept in which all assignments and transfers of stocks shall be made. No transfer of the stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise; and certificates of stock shall contain upon them notice of this provision. Transfers of stock shall not be suspended preparatory to a declaration of dividends, and except in cases of agreement to the contrary expressed in the assignments; dividends shall be paid to the stockholder in whose name the stock shall stand on the day on which the dividends are declared.

SEC. 16. Certificates of stock signed by the president and cashier may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred the certificates thereof shall be returned to the bank and cancelled, and new certificates issued.

EXPENSES.

113 All the current expenses of the bank shall be paid by the cashier, who shall every six months, or oftener if required to do so, make to the board a detailed statement thereof.

CONTRACTS.

SEC. 17. All contracts, checks, drafts, &c., and all receipts for circulating notes received from the comptroller of the currency shall be signed by the president or cashier.

EXAMINATIONS.

SEC. 18. There shall be appointed by the board every three months a committee, whose duty it shall be to examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with balances on its general ledger for the purpose of ascertaining whether or not the books are correctly kept and the condition of the bank corresponds herewith, and whether or not the bank is in a sound, solvent condition, the result of which examination shall be reported to the board at their next regular meeting.

MEETINGS.

SEC. 19. The regular meetings of the board shall be held on the first Monday in each month at 3 p. m. Special meetings may be called by the president or cashier.

QUORUMS.

SEC. 20. A majority of the director, including the president, shall be a quorum to do business.

114 SEC. 21. These by-laws may be changed or amended by the vote of two-thirds of the directors.

Exhibit "J."

H. B. OLMSTEAD, being first duly sworn, deposeth as follows:

Question. State your age, name, etc.

Answer. H. B. Olmstead; teller in Franklin bank; resident of Cincinnati; age, 42 years.

Q. State how and when, and to whom was paid the certificate of deposit.

A. I have no personal recollection of it; our books show that it was paid on the 16th day of July, 1867, the whole amount paid on that day; how it was paid I can't tell, now to whom; I suppose it was paid to John B. C. Moores; there was no other endorsement.

(Signed) H. B. OLMSTEAD.

Exhibit "K."

At a meeting of the board of directors of the Citizens' National Bank, of Piqua, held Aug. 9th, 1869, the following appears on the record-book of said bank: On motion, the following resolution was adopted and ordered to be placed upon the minutes:

Whereas Robt. B. Moores, who was the owner of 275 shares of the capital stock of this bank (evidenced by certificate No. forty-seven (47) for fifty shares, dated May 2d, 1867; certificate
115 No. forty-eight (48) for fifty shares, dated May 2nd, 1867; certificate No. forty-nine (49) for sixty-five shares, dated May 2d, 1867; certificate No. 53 for seventy (70) shares, dated June 11th, 1867, and certificate No. (54) fifty-four for forty shares, (40,) dated June 11th, 1867,) became indebted to this bank in the sum of thirty-seven thousand two hundred and forty-seven 29-100 dollars, ($37,247.29,) and did, on the 16th day of January, 1868, transfer one hundred and eighty-five shares (185) of said stock, and on the 15th day of May, 1869, did transfer ten (10) shares of said stock, on the books of this bank, to G. Volney Dorsey in consideration that said G. Volney Dorsey pay to this bank the sum of nineteen thousand five hundred dollars of said indebtedness; and whereas Jason Evans, who became the holder of seventy (70) shares of said stock issued as aforesaid and transferred to him by the said R. B. Moores on the books of this bank Sept. 4th, 1867, as per certificate No. 59, did, on the 20th day of February, 1869, transfer to G. Volney Dorsey, on the books of this bank, by his power of attorney, all his right, title, and interest in the same; therefore said transfers, as hereinbefore stated, are approved and affirmed by the directors of this bank.

The following is the section of our by-laws in regard to the transfers of stock:

116 SEC. 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and povisions of the act, and a transfer-book shall be kept in which all assignments and transfers of stock shall be made. No transfer of the stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise, and certificates of stock shall contain upon them notice of this provision. Transfers of stock shall not be suspended preparatory to a declara-

tion of dividends, and except in cases of agreement to the contrary, expressed in the assignments, dividends shall be paid to the stockholders in whose name the stock shall stand on the day on which the dividends are declared.

STATE OF OHIO, }
Miami county. }

I, J. R. Allen, cashier of the Citizens' Nat. Bank, of Piqua, Ohio, do solemnly swear that the above is a true copy from the record of minutes and from the by-laws of this bank.

J. R. ALLEN, *Cashier.*

Sworn to and subscribed before me this 2nd day of November, A. D. 1870.

[SEAL.]

WM. C. JOHNSON,
Notary Public, Miami co., O.

117 *Exhibit "L."*

CITIZENS' NATIONAL BANK OF PIQUA,
PIQUA, O., *June* 25, 1882.

JOHN B. C. MOSES, esq., Cincinnati, O.:

DEAR SIR: I am informed that you hold a certificate or certificates of stock purporting to be issued by this bank. Will you be good enough to inform me the No., date, and amount of the certificates held by you. I never heard of this until you mentioned it to Doctor Parker.

Respectfully yours,
G. VOLNEY DORSEY, *Pres't.*

And afterwards, to wit, on the tenth day of March, in the year last aforesaid, came the plaintiff by her attorneys and filed in the clerk's office of the court aforesaid her certain petition for writ of error in this case, which said petition is in the words and figures following, to wit:

Petition for Writ of Error.

UNITED STATES OF AMERICA, }
Southern district of Ohio. }

To the honorable justices of the supreme court of the United States:

And now comes Caroline A. Moores, of Cincinnati, Ohio, by her attorneys, and complains that in the record and proceedings,
118 and also in the rendition of judgment in a suit between said Caroline A. Moores, plaintiff, and The Citizens' National Bank of Piqua, Ohio, defendant, tried in the circuit court of the United States for said southern district of Ohio, at the February term thereof, A. D. 1883, and in which judgment was rendered

against her on the 5th day of March, A. D. 1883, manifest error hath intervened to the great damage of the said plaintiff.

Wherefore she prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

E. W. KITTREDGE,
JOHN WARRINGTON, AND
M. E. SHOEMAKER.
Att'ys for Plaintiff.

Allowed March 10th, 1883.
JNO. BAXTER, *U. S. Circuit Judge.*

And afterwards, but on the same day and in the year last aforesaid, came the plaintiff and filed in the clerk's office of the court aforesaid her certain error bond in this cause, which said bond is in the words and figures following, to wit:

Error Bond.

Circuit court of the United States, southern district of Ohio.

119 Caroline A. Moores
vs.
Citizens' National Bank of Piqua, Ohio. } No. 1734.

Know all men by these presents that we, Caroline A. Moores, as principal, and Franklin H. Lawson and John B. C. Moores, are held and firmly bound unto the Citizens' National Bank of Piqua, Ohio, in the sum of five hundred dollars, to be paid to the said, The Citizens' National Bank, of Piqua, Ohio; to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, firmly by these presents.

Sealed with our seals. Dated this 10th day of March, 1883.

Whereas, the above named Caroline A. Moores has sued out her writ of error to the supreme court of the United States, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio—

Now therefore, the condition of this obligation is such, that if the above-named Caroline A. Moores shall prosecute her said writ of error to effect, and answer all costs if she shall fail to make good her plea, then this obligation to be void; otherwise to re-
120 main in full force and virtue.

[SEAL.] FRANKLIN H. LAWSON,
[SEAL.] JOHN B. C. MOORES.

Sealed and delivered in presence of—
ROBERT C. GEORGE.
RICHARD DORMAN.

The above security is approved.

JNO. BAXTER,
Circuit judge of the United States, S. D. Ohio.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of error in this cause, directed to the judges of the circuit court for said district, which said writ of error is in the words and figures following, to wit:

Writ of Error.

THE UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Caroline A. Moores and the Citizens' National Bank of Piqua, O., a manifest error hath happened to the great damage of the said Caroline A. Moores, as by her complaint appears.

121 We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said supreme court to be then and there held, that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, chief justice of the said supreme court, the tenth day of March, 1883, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] WM. C. HOWARD,
Clerk of the Circuit Court of the U. S., S. D. O.

And afterwards, but on the same day and in the year last aforesaid, there was issued out of the clerk's office of the court aforesaid our certain citation to defendant in error, which said writ of citation is in the words and figures following, to wit:

122 *Citation to Defendant in Error.*

THE UNITED STATES OF AMERICA, *ss.*

To the Citizens' National Bank of Piqua, Ohio, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the *clerk's office of the* circuit court of the United States for the southern district of Ohio, whe-re in Caroline A. Moores is plaintiff and you are defendant in error, to

show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, chief justice of the said supreme court, this 10th day of March, in the year of our Lord one thousand eight hundred and eighty-three

[SEAL.] JNO. BAXTER,
U. S. Circuit Judge, etc.

And afterwards, to wit, on the tenth day of March in the year last aforesaid, came the marshal of said district, to whom the said writ of citation in error was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid
123 with his proceedings endorsed thereon in the words and figures following, to wit:

Marshal's Return on Citation to Defendant in Error.

MARCH 10th, 1883.

Service accepted. Ramsey & Matthews, att'ys for def't. Received this writ at Cincinnati, March 10, 1883, and served same, as above, on March 10, 1883.

J. C. ULLERY, *U. S. M.*
By T. M. TURNER, *Deputy.*

124 And afterwards, to wit, on the 16th day of May, in the year last aforesaid, came the plaintiff by her attorneys, and filed in the clerks office of the court aforesaid a certain assignment of errors and prayer for reversal in this case, which said assignment of error is in the words and figures following, to wit:

Supreme court of the United States.

Assignment of Errors and Prayer for Reversal.

Caroline A. Moores, plaintiff in error,
vs.
The Citizens' National Bank of Piqua, Ohio, defendant in error.

At the October term, in the year of our Lord one thousand eight hundred and eighty-three, on the second Monday of October in said term, before the justices of the supreme court of the United States, at the capital in the city of Washington, comes the said Caroline A. Moores, by her attorneys, E. W. Kittridge, John W. Warrington, and M. C. Shoemaker, and says that said defendant in error, at the February term, A. D. 1883, of the circuit court of the United States for the southern district of Ohio, recovered
126 a judgment, by the consideration of said court, against plaintiff in error in a certain action then pending in said court

wherein this plaintiff in error was plaintiff and defendant in error was defendant.

Plaintiff in error says further, that in the record and proceeding aforesaid there is manifest error to the prejudice of plaintiff in error, in this, viz: that the court erred in excluding testimony offered by plaintiff below which should have been admitted, and in admitting offered by defendant below which should have been excluded; and in this, viz.: that said court erred in the charge to the jury, and in directing the jury to return a verdict for the defendant, and in this, viz.: said court erred in overruling the motion of plaintiff below to set aside the verdict and for a new trial, and in rendering judgment on said verdict for defendant below, as will more fully appear from the transcript of the record in said cause herewith filed; and the said Caroline A. Moores, plaintiff in error, prays that the judgment aforesaid may be reversed and held for naught, and that she be restored to all things which she hath lost by reason of the premises.

E. W. KITTREDGE,
JOHN W. WARRINGTON, AND
M. C. SHOEMAKER.

127 THE UNITED STATES OF AMERICA, }
Southern district of Ohio, } *ss.*

I, William C. Howard, clerk of the circuit court of the United States for said district, do hereby certify the foregoing to be a true and correct transcript of the record and proceedings, except the first bill of exceptions, with the exhibits, in the case wherein Caroline A. Moores is plaintiff and The Citizens' National Bank of Piqua, Ohio, is defendant, as the same remain on file and of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 2d day of June, A. D. 1883, and in the one hundred and seventh year of the independence of the United States of America.

Attest: WILLIAM C. HOWARD,
[SEAL.] *Clerk U. S. circuit court, S. D. O.*

128 THE UNITED STATES OF AMERICA, *ss:*

To the Citizens' National Bank of Piqua, Ohio, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Caroline A. Moores is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, chief justice of the said supreme court, this 10th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] JNO. BAXTER,
U. S. circuit judge, &c.

(Endorsed :) 3, 10, '83 ; United States circuit court, southern district of Ohio; No. 1734 ; Caroline A. Moores—Citizens' Nat. Bank of Piqua, Ohio ; citation to defendant in error ; filed March 10th, 1883 ; Wm. C. Howard, clerk.

129 MAR. 10th, 1883.

Service accepted.

RAMSEY & MATTHEWS,
Att'ys for Def't.

Received this writ at Cincinnati, O., March 10, 1883, and served same—as above—on March 10, 1883.

J. C. ULLERY, *U. S. M.*,
By T. M. TURNER, *Deputy.*

Service, 2.00
1 mile, 06

2.06

130 THE UNITED STATES OF AMERICA, *ss.*

The president of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, greeting :

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Caroline A. Moores and The Citizens' National Bank of Piqua, O., a manifest error hath happened, to the great damage of the said Caroline A. Moores, as by her complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said supreme court, to be then and there held, that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, chief justice of the

said supreme court, the 10th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] WM. C. HOWARD,
Clerk of the circuit court of the U. S., S. D. O.

(Endorsed:) United States circuit court, southern dist. of Ohio; No. 1734; Caroline A. Moores *vs.* Citizens' Nat. Bank of Piqua, Ohio; writ of error; E. W. Kittredge, M. C. Shoemaker, and J. W. Warrington, att'ys.

(Endorsed on cover:) S. Ohio; C. C. U. S.; No. 900; Caroline A. Moores, plaintiff in error, *vs.* The Citizens' National Bank of Piqua, Ohio; filed 11th July, 1883; 130 pages.



111-158

Supreme Court of the United States.

Caroline A. Moores,

PLAINTIFF IN ERROR.

— vs. —

The Citizens National Bank of Piqua, Ohio,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

E. W. KITTREDGE,
JOHN W. WARRINGTON,
M. C. SHOEMAKER,
For Plaintiff in Error.

1884:
Press of GEO. R. TOPP, Law Printer,
Cincinnati, Ohio.

Supreme Court of the United States.

Caroline A. Moores,

PLAINTIFF IN ERROR,

— vs. —

The Citizens National Bank of Piqua, Ohio,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This case has formerly been before this Court, and a very accurate analysis of the pleadings is found in the report of the case in 104 U. S., 625.

The plaintiff by amended petition, alleged that the defendant is a National Bank, incorporated under the laws of the United States, with a capital stock of one thousand shares of one hundred dollars each; that on the 15th of July, 1867, G. Volney Dorsey was its president, and Robert B. Moores its cashier. That on that date Robert B. Moores represented himself to the plaintiff, and appeared on the books of the bank to be, the owner of more than ninety-one

Amended Petition. R., 8.

shares of said stock, that plaintiff purchased of him ninety-one shares of said stock and thereupon the said Dorsey as president, and Robert B. Moores as cashier, signed and issued to her a certificate therefor in the usual form, and plaintiff paid said Robt. B. Moores therefor $9,100 in money, believing the representations of said Robt. B. Moores as cashier, that the stock had been duly transferred by him to her on the books of the bank. That after the certificate had been issued to her, the defendant fraudulently permitted and procured Robt. B. Moores to make on its books transfers of all the stock owned by him, or standing in his name to Dorsey, its president, for its benefit, and refused and still refuses to recognize the plaintiff as owner of the ninety-one shares of stock, or to recognize the validity of said certificate. That the fact that no transfer had been made to the plaintiff upon the books of the bank at the time of the issue and delivery of the certificate to her, and the fact that the stock standing in the name of Robt. B. Moores was so transferred on the books to its president, were fraudulently concealed from plaintiff by the defendant through its cashier, Robt. B. Moores. That by reason of the said fraudulent conduct and acts of defendant, the plaintiff's certificate was invalid and worthless, and she had lost the $9,100 paid by her therefor.

Answer, R., E.

The defendant's answer set up three defenses as follows:

First. The statute of limitations of four years.

Second. That the said sum of $9,100 had been re-paid to plaintiff by Wm. B. Moores, who thereby became entitled to the paper purporting to be a certificate of stock.

Third. That the paper purporting to be a certificate, was issued by Robt. B. Moores, in violation of his duty as cashier, without the knowledge or consent of the president,

or any other officer of the defendant; that by defendant's by-laws no one could procure a certificate without the surrender of a certificate for a like amount for cancellation; and that prior to the 15th of July, 1867, the shares previously held by Robt. B. Moores had been transferred by him, and upon the books of the bank, to other persons.

Reply. R., 17.

The plaintiff replied to the first defense: First, pleading her coverture; second, that the cause of action accrued within four years; and to the second defense by joining issue; and to the third defense, she demurred.

The defendant thereupon demurred to the reply of coverture.

The Court below sustained the defendant's demurrer to the reply of coverture. And, also, sustained the plaintiff's demurrer to the third defense.

Amendment of Answer. R., 19.

The defendant thereupon amended its third defense by adding thereto in substance a general denial of the allegations of fraud in the petition. The plaintiff having joined issue upon the third defense, the case was originally tried upon submission to the Court, and resulted in a judgment for defendant. This judgment was reversed by this Court, upon the ground that the Court below erred in sustaining the demurrer to the plaintiff's reply of coverture to the plea of the statute of limitations. Upon the argument of that question in this Court, it was urged for the defendant that the demurrer searched the record, and that the petition did not set forth a cause of action, so that the plaintiff suffered no prejudice by the ruling complained of, even if the reply of coverture was otherwise good. But this Court, held in answer to that argument, that the petition did allege a good cause of action.

The judgment having been reversed and the cause re-

Plaintiff's Evidence. R., 27.

manded, the case was retried before a jury. The plaintiff to sustain the issues on her part, proved the agreement with Robt. B. Moores for the purchase of the stock. That the certificate was sent to her at Cincinnati, where she lived, by Robt. B. Moores, from Piqua, by mail. That she thereupon paid therefor the sum of $9,100, in pursuance of the agreement. The signatures of the president and cashier, and the corporate seal of the defendant, upon the certificate produced by plaintiff, were then admitted to be genuine, and the certificate was offered in evidence. It was as follows:

"THE CITIZENS' NATIONAL BANK OF PIQUA,

STATE OF OHIO.

STAMP. No. 56. 91 Shares.

This is to certify that Mrs. Carrie A. Moores is entitled to ninety-one shares of one hundred dollars each of the capital stock of *The Citizens' National Bank of Piqua*, transferable only on the books of the bank, in person or by attorney, on the surrender of this certificate.

PIQUA, O., July 15, 1867.

(Signed)

ROB'T B. MOORES, *Cashier.* G. VOLNEY DORSEY, *President.*"

Admissions. R., 32.

It was thereupon admitted by the defendant that Robert B. Moores was insolvent, and that the market value of the stock at the time of the transaction was ninety per cent. of the par value, and that said Robert B. Moores at that time appeared on the books of the defendant bank as owner of two hundred and seventy-five shares of the capital stock of the bank.

The plaintiff further offered the certificate of organization of the defendant which provided, among other things: Certificate of Organization. R., 52.

"Third. The capital stock of the association shall be one hundred thousand dollars, and the same shall be divided into one thousand shares of one hundred dollars each."

The by-laws, of the association which provided, among other things: By-laws. R., 53.

"SEC. 4. The officers of this bank shall be a president, cashier, teller, book-keeper, and such other officers as may be from time to time required for the prompt and orderly transaction of its business.

"Sec. 7. The cashier of this bank shall be responsible for all the moneys, funds and valuables of the bank, and shall give bond, with security, to be approved by the board, in the penal sum of $....., and conditioned for the faithful and honest discharge of his duties as such cashier, and that he will faithfully apply and account for all such moneys, funds and valuables, and deliver the same on proper demand to the order of the board of directors of this bank, or to the person or persons authorized to receive them.

"Sec. 8. The president of this bank shall be responsible for all such sums of money and property of every kind, as may be intrusted to his care or placed in his hands by the board of directors or by the cashier, or otherwise come into his hands as president, and shall give bond in the penal sum of $....., with security to be approved by the board, conditioned for the faithful discharge of his duties as such president, and that he will faithfully apply and account for all sums of money and other property of the bank that may come into his hands as such president, and pay over and deliver the same to the order of the board of directors, or to any other person or persons authorized to demand or receive the same.

"Sec. 12. Whenever an increase of stock shall be determined upon in accordance with the provisions of the articles of association of this bank, it shall be the duty of the board to notify all the stockholders of the same, and to cause a subscription to be opened for such increase of capital. In the increase of capital each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for according

to his existing stock in the bank. If any stockholder shall fail to subscribe for the amount of stock to which he may be entitled, the board of directors may determine what disposition shall be made of the privilege of subscribing for the unsubscribed stock.

"Sec. 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act: and a transfer book shall be kept, in which all assignments and transfers of stocks shall be made. No transfer of the stock of this association shall be made, without the consent of the board of directors, by any stockholder who shall be liable to the association either as principal debtor or otherwise; and certificates of stock shall contain upon them notice of this provision. Transfers of stock shall not be suspended preparatory to a declaration of dividends, and except in cases of agreement to the contrary expressed in the assignments, dividends shall be paid to the stockholder in whose name the stock shall stand on the day on which the dividends are declared.

"Sec. 16. Certificates of stock signed by the president and cashier may be issued to the stockholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred the certificates thereof shall be returned to the bank and cancelled, and new certificates issued."

And thereupon the plaintiff rested.

The defendant called G. Volney Dorsey who testified that he was the president of the bank, and produced the certificate book of the bank in the hand writing of R. B. Moores' showing the stub of a certificate corresponding in number with that produced by the plaintiff (No. 56) with the word "destroyed" in R. B. Moores' hand-writing upon it.

He further testified that he had no knowledge of the issue of the plaintiff's certificate until June 18, 1872, and that he did not know of any officer of the bank who had knowledge of the transaction excepting the cashier. To this evidence the plaintiff objected and excepted to its admission.

The witness further testified that as president, he signed a few certificates of the bank, two or three at a time, in blank, to be used by the cashier if they were needed when he was absent from the bank.

The plaintiff then proved by the witness the minutes of a meeting of the board of directors of the defendant bank, held in August, 1869, a copy of which marked "Exhibit K," is attached to the record, whereat the following resolution was adopted: Minutes. R., 34.

"Whereas, Robert B. Moores, who was the owner of two hundred and seventy-five shares of the capital stock of this bank (evidenced by certificate No. forty-seven (47) for fifty shares dated May 2, 1867. Certificate No. forty-eight (48) for fifty shares dated May 2, 1867. Certificate No. forty-nine (49) for sixty-five shares dated May 2, 1867. Certificate No. 53 for seventy (70) shares dated June 11, 1867, and certificate No. fifty-four (54) for forty (40) shares dated June 11, 1867,) became indebted to this bank in the sum of thirty-seven thousand two hundred and forty-seven 29-100 dollars ($37.247 29-100), and did on the 16th day of January, 1868, transfer one hundred and eighty-five shares (185) of said stock and on the 15th day of May, 1869, did transfer ten (10) shares of said stock on the books of this bank to G. Volney Dorsey in consideration that said G. Volney Dorsey pay to this bank the sum of nineteen thousand five hundred dollars of said indebtedness, and whereas Jason Evans who became the holder of seventy (70) shares of said stock, issued as aforesaid and transferred to him by the said R. B. Moores on the books of this bank September 4, 1867, as per certificate No. 59 did on the 20th day of February, 1869, transfer to G. Volney Dorsey on the books of this bank by his power of attorney, all his right, title and interest in the same; therefore, said transfers as hereinbefore stated are approved and affirmed by the directors of this bank." Resolution. R., 57.

The plaintiff offered this resolution in evidence, but the Court of its own motion, without any objection by the defendant, excluded it, to which the plaintiff excepted. Rulings of the Court. R., 34.

The plaintiff offered proof of other instances in which certificates of stock were issued by the bank, without the surrender of corresponding certificates, but the Court excluded the evidence and the plaintiff excepted.

The defendant then called Robert B. Moores, who testified that at the date of the plaintiff's certificate, he was cashier of the defendant bank, but that he was now engaged in quarrying stone, that the hand-writing in the certificate was his own except the signature of the president. The defendant then asked the following question:

Moore's Evidence. R., 38.

Question. What interest had the bank in the transaction between yourself and Mrs. Moores, the plaintiff?

To which the plaintiff objected, and the Court overruled the objection, and the plaintiff excepted, and the witness testified that the bank had no interest in the transaction. The defendant asked the further question:

Question. In what manner was that certificate issued to Mrs. Moores, the physical act and fact connected with its issue? How did you come to get Mr. Dorsey's signature to that certificate?

To which the witness answered:

Well, I cannot say now. It has been so long ago. It might have been signed in the book in blank, or I may have cut it out.

The witness further testified, subject to the exception and objection of the plaintiff, that the defendant bank did not get any of the money from the transaction with the plaintiff. The defendant further asked the witness:

Question. On the 15th of July, 1867, what genuine certificates of stock did you hold in point of fact?

Answer. Well, when I bought out the Megrues, all the certificates bought of William and Newt. Megrue, were issued, and when they were issued to me, the amounts were made out by J. R. Allen, and I signed them and Dr. Dorsey

signed them. When they were made out they were deposited with Mr. C. B. DeCamp, a partner of the firm.

Question by the Court:

State generally the facts, whether you had hypothecated the certificates?

Answer. I had done it, or authorized it to be done.

By the Court:

Well, had it been done?

Answer. I think it had, I am very positive of that.

By the Court:

Do you know?

Answer. Well, if I had the books of the firm I could tell the date.

Question. The question is not the date, but whether it had been done. Prior to July, 1867, you had put them in the hands of the firm, with authority to use them?

Answer. Yes, sir.

Question. Did you ever get the certificates again yourself?

Answer. No, sir.

After further testimony of like character, as to what had become of the certificates of stock held by the witness, the following question was put by the Court:

Question. At the time you issued this certificate to the plaintiff, did you return any other certificate that you held in the bank?

Answer. No, sir; I did not. I did not have it.

By the Court:

Did you issue the certificate without any authority?

Answer. Yes, sir; except so far as I was concerned myself.

By the Court:

No authority from the bank to you?

Answer. No, sir.

By the Court:

Did the other officers know of the fact?

Answer. No, sir.

By the Court:

Did the bank get any benefit from that transaction?
Answer. No, sir.

Upon cross-examination the witness was shown a letter dated July 15th, 1867, in which he enclosed the certificate in question, for the plaintiff, to her husband, and was asked:

Question. In the very first sentence is this. "Herewith I hand you stock transferred to Carrie." Now, you wrote that to your brother?

Answer. Yes, sir.

Question. What did you mean by "transferred" to her if you did not transfer it?

Answer. I wrote it to her in that way, because he said he would always take care of that stock, and that the stock was to be put on the books of Moores & Hukill.

Question. Did you transfer it?

Answer. No, sir.

* * * * * *

Question by the Court.

Was this transaction at Cincinnati or Piqua?

Answer. It was done at Cincinnati altogether, with the exception of issuing this stock, which was done at the bank.

Thereupon the Court charged the jury, in an elaborate charge set forth at length in the record, among other things, as follows:

Charge to the Jury. R., 45.

"But, it is now admitted, that although the books of the defendant showed Moores was the owner of two hundred and seventy-fives shares of the capital stock of the defendant at that time, the same had been transferred and hypothecated by him to others, and that in point of fact, he did not own any stock."

To which portion of the charge the plaintiff excepted.

The Court further charged the jury:

"Now, if we accept the plaintiff's theory of the law, to-wit, that a party purchasing or loaning money in good faith upon the certificate of stock, bearing the genuine sig-

natures of the corporate officers authorized and charged with the duty of transferring the stock on the books of the company and issuing certificates of ownership therefor, in the usual form and regular in all respects upon its face, without any knowledge of its fraudulent or spurious character, is entitled to recover from the corporation the damages sustained by reason of the spurious, fraudulent and invalid character of such certificate, this Court, as at present advised, entertains the opinion, and so instructs you, that no such recovery can be had, upon the facts proven in this case."

To which portion of the charge the plaintiff excepted.

The Court further charged the jury:

"If a recovery could be had in any case, it could only be had by an innocent holder for value. The plaintiff is, in the ordinary sense an innocent holder; that is, she relied on Moores' representations; believed he owned stock in the defendant's corporation; relied, no doubt in good faith, upon his promise to have ninety-one shares thereof transferred to her, and accepted the same in the belief that the certificate was issued by authority in the due course of its business, in lieu of stock belonging to him and which he had surrendered and caused to be cancelled."

* * * * * *

"It may, as we have already said, for the sake of the argument be conceded, that money loaned or advanced by an innocent party upon the faith of such a certificate could be recovered from the corporation. But, is the plaintiff, in the eye of the law such an innocent person? These terms have in law a technical meaning. Ignorance of facts, which the law under the circumstances of the particular case, requires a party to know, does not excuse the want of diligence or throw around the party the immunity which attaches to persons exempt from all laches or blame. In other words, if there is any fact, which in contemplation of law, puts a party on inquiry, and he fails to make the investigation which if made, would develop the fraud, he is to be treated in all respects as if he had actual knowledge of the facts. There is another principle of law applicable to this case; an agent cannot lawfully act in the same matter for his principal and for himself, in cases wherein their interests are adverse to each other."

* * * * * *

"Now, is this principle applicable to the facts of this case? Keep in mind, that the plaintiff was dealing with Moores, the cashier, in his individual capacity. She agreed to loan her money to him, on condition that he would have a certificate issued to her for ninety-one shares of the defendant's capital stock. He undertook to do this. The undertaking was for his own benefit in order to enable him to consummate the loan. He had possession of the bank's book of certificates. One of the certificates contained therein was signed by the president in blank and left with him for use when occasion required. He took this, and without authority, without consideration, and without the knowledge of any other officer of the bank, filled it up in the plaintiff's name and delivered it to her, with the contract of the 15th of July, 1867, in relation thereto, as a security for the repayment of the money loaned. This certificate made by Moores for his own benefit, is filled up in his handwriting, and signed by him as cashier. Now, while the plaintiff relied upon his honesty, and believed that the certificate had been issued in good faith and by competent authority, she knew that in issuing it, Moores was acting for himself, that the certificate was issued by him for his own benefit, to be used for the purpose and in the manner stated. This knowledge, we think, was enough to put her on enquiry. If she had made the enquiry, which the law as well as prudential reasons required, under the circumstances of this case, Moores' fraudulent action would have been developed and the loss resulting therefrom avoided.

Agents entrusted with important interests and invested with enlarged powers, have many opportunities for an abuse of their trust. Nevertheless, if their fraudulent acts are within the scope of their agencies, and a loss must result either to their principals or to an innocent person who relied upon their action in the belief that the same was valid and done in good faith, the law would cast the loss upon the principal, who selected and placed the agent in the position to do the wrong, and not on the innocent party. But if the complaining party knows, when accepting a check, certificate of stock, receipt or other acquittance or obligation, issued or executed by the agent in the name of the principal, that he was acting in regard thereto for himself and in his own interest, such knowledge would put such party on enquiry, and divest

him or her of the legal rights and incidents pertaining to that class of persons.

The plaintiff having had knowledge of the fact, that is, of the fact that the agent was acting for himself in the matter of the transfer of this stock, that Moores, the cashier, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier—that is, acting for the bank upon one side and for himself upon the other side, in reference to the matter of issuing this certificate, she is not, in the judgment of this Court, an innocent holder of the stock, and as the certificate was issued without authority and in fraud of the rights of the bank, the Court instructs you to return a verdict for defendant."

To which charge the plaintiff excepted.

ERRORS ASSIGNED.

1. The Court erred in excluding the evidence offered by plaintiff in error; and specifically in excluding the minutes of defendant, Exhibit K., (R. 57), and the evidence of other issues of certificates issued by defendant. (R. 34 and 37.) Errors Assigned.

2. The Court erred in its charge to the jury.

PROPOSITIONS OF LAW SUBMITTED.

1. The issuing of such a certificate of stock, signed by the president and the cashier of the defendant, and under its corporate seal, is the corporate act of the defendant, and not the act of the president and cashier, as mere agents of the corporation. Such a certificate is, to all intents and purposes, the certificate of defendant corporation in its corporate capacity.

Wilson vs. Salamanca, 99 U. S., 499.

Pollard vs. Vinton, 105 U. S., 7 see p. 12.

Scotland Co. vs. Thomas, 94 U. S., 682.

2. The by laws of defendant required a certificate for stock owned by its cashier or president to be in the same form, and issued and transferred in the same manner as certificates of stock owned by any other stockholder of defendant. The fact, therefore, that the plaintiff's certificate was understood by her at the time to be issued upon a surrender or transfer of stock owned by Robert B. Moores, the defendant's cashier, was not notice of any irregularity in the issuing of said certificate, or want of validity thereof to the plaintiff.

Titus vs. Turnpike Co., 61 N. Y., 237.

S. C., 5 Lansing, 250.

Western Md. R. R. Co., vs. Franklin Bank, 60 Md.

American and English Corporation Cases, Jan., 1884, p. 46.

Willis vs. Fry et al., 13 Phil., Pa., 33.

Shaw vs. Spencer, 100 Mass., 382.

Ashton vs. Atlantic Bank, 3 Allen, 217.

3. The defendant is estopped to deny, as against a *bona fide* purchaser for value, the validity of such a certificate, if it was not an over-issue; and if it was an over-issue, the defendant is responsible for the loss sustained by such a *bona fide* purchaser for value.

Bank vs. Lanier, 11 Wall., 369.

Case vs. Bank, 100 U. S., 446.

Johnston vs. Laflin, 103 U. S., 800.

N. Y. & N. H. R. R. Co. vs. Schuyler, et al., 34 N. Y., 30.

Bruff vs. Mali, 36 N. Y., 200.

Holbrook vs. Zinc Co., 57 N. Y., 616.

Titus vs. Turnpike Co., 61 N. Y., 237.

Tome vs. R. R. Co., 39 Md., 36.

Western Md. R. R. Co. vs. Franklin Bank, 60 Md.
Machinists' Nat. Bank vs. Field, 126 Mass., 345.
Bank of Ky. vs. Schuylkill Bank, 1 Parsons Sel. Cases, 180.
In Re Bahia & San Francisco R. R. Co., L. R. 3 Q. B. 584.

4. It was negligence for the president of the defendant to sign certificates in blank, and leave them with its cashier. And the rule of law applies that where one of two innocent persons must suffer by the fraud of a third party, he who has, by his trust and negligence, enabled such third party to commit the fraud must answer for the loss.

Merchants' Bank vs. State Bank, 10 Wall., 604, (citing on page 646, with approval
Schuyler vs. R. R. Co., 34 N. Y., 30.)
Bank vs. Wentworth, L. R., 5 Exch. Div., 96-105.
Pompton vs. Cooper Union, 101 U. S., 196.
Dair vs. United States, 16 Wall., 1.

5. If, at the date of said certificate, Robert B. Moores was the owner of any stock in the defendant corporation, the plaintiff became entitled to it, to the extent of ninety-one shares, whether it was then surrendered and cancelled or not; and it was error for the Court to exclude Exhibit K, and to assume, and to charge the jury, upon the evidence adduced, that Robert B. Moores was not the owner of such stock and that defendant was entitled to a verdict.

Moores vs. Piqua Bank, 104 U. S., 625.
Bridgeport Bank vs. R. R. Co., 30 Conn., 270.

ARGUMENT.

It is said that a certificate of stock is a non-negotiable instrument. It is an instrument of evidence, recognized by the law, of ownership of its stock, created and issued by the corporation in the exercise of its franchise, and in the interest of the whole body of its stockholders, to enable its shares to be freely dealt in by the public. It is issued as an evidence of title and performs no other function. It differs from a bill of lading in that the latter is a contract of carriage by the carrier, to which the receipt for goods contained in it is a mere incident. It is true that bills of lading are dealt in largely, by the commercial world, as evidence of title, and as symbols of the goods for which the bill of lading is, in part, a receipt. But this dealing is in no wise in the interest, or for the benefit of the carrier. It is no part of the carrier's object, in executing it, that it should be so dealt in; but it is an essential part of his contract of carriage, that it should contain a description of, and receipt for, the goods which are the subject matter of his contract of carriage. That it is largely used by the commercial world, furnishes of itself no reason why the carrier's responsibility should be increased, or why he should be held responsible otherwise than for the performance of his contract of carriage.

Warehouse receipts are of like character with bills of lading. They are contracts of storage to which the receipt of the goods to be stored, which they express, is a mere incident.

In general both a bill of lading and a warehouse receipt are signed by agents, as mere agents. A certificate of stock

is, in modern practice at least, given under the seal of the corporation, and issued by the chief executive officers in their official capacities, as the legal representatives of the corporation and not as mere agents. In the language of this Court, in *Pollard vs. Vinton*, where the distinction between a bill of lading and a certificate of stock, is the subject of consideration, "in the one case it is a question of *pure agency*, and depends wholly on the power confided to the agent; in the other case *the officer is the corporation* for many purposes."

The certificate of stock is issued as a certificate. Its only purpose is to serve as the written testimony of the corporation to the ownership of its stock, for the only possible purpose which such a testimony can subserve, viz: to enable it to be freely dealt in by whomsoever it may be offered to for that purpose. That is one of its elements of value, which is an object of conferring the franchise, by virtue of which it is issued. As is again said by this Court in *Bank vs. Lanier*, at p. 377:

"The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage. It is in obedience to this requirement, that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they

approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him."

It is in vain therefore to cite to this Court *Pollard vs. Vinton*, or other authorities, for the purpose of showing that a bill of lading will not bind the carrier unless the goods described in it are actually delivered to be carried. It has never been doubted indeed, in reference to a bill of lading, that if one applied to the carrier himself, being the principal, and informed him that he proposed to deal upon the faith of his answer, and thereupon received assurance that he actually had received the goods, especially if this assurance was in writing, and given for a consideration, that the carrier would be held to its truth.

That is the very principle of the decision in *Griswold vs. Haven*, 25 N. Y., 595; distinguishing it from *Grant vs. Norway*, a distinction approved by the Supreme Court of Ohio, in *Bank vs. Walbridge*, 19 O. St., 419. But this fact which thus distinguishes a representation made to a party about to act upon it, from the acknowledgment to the shipper of the receipt of goods contained in a bill of lading, is the very consideration that distinguishes a bill of lading from a certificate of stock, *i. e.* the fact that the latter is

made for the sole purpose of being acted upon by third parties, and made not by an agent, but by the principal, and in the furtherance of its own and its stockholders interests, in the exercise of its franchise.

A corporation it is true, acts by agents. It cannot act otherwise. But in a class of cases it acts by officers, who, in respect to the particular subject matter, exercise the entire corporate power of the corporation. Such a subject matter is the franchise to issue certificates of capital stock. The defendant bank can have no power except such as it may exercise through its officers, and its whole power is vested in its president and cashier in respect to the issue of such certificates. They affix the seal of the corporation, and sign as officers, not as mere agents, in token that it is the act of the corporation when it is executed.

"In the one case," says this Court, "the corporation is bound if the action of the officers is within their corporate powers, while in the other the action must be within the corporate powers delegated to the agent."

Wilson vs. Salamanca, 99 U. S., 504.

There is nothing in the fact that municipal bonds were the subject of consideration in that case, to prevent the application of this principle. The doctrine enunciated is not one of peculiar application to negotiable paper, nor is it announced as such. It is a question of corporate action, when it is the action of the corporation, as distinguished from the act of a mere agent, dependent upon the character in which it is performed, and not at all dependent upon the negotiable or non-negotiable character of the instrument that is being considered.

Baron Parke expresses the effect to be given to the

presence of the corporate seal upon contracts generally, in *S. Y. Railway Co. vs. G. N. Railway Co.*, 9 Exch. Rep. on * p. 84, in the following language:

"In partnerships, where all the members do not concur in the contract (and it is often that they do not), one partner may bind the other in all contracts within the scope of their ordinary partnership dealings; in those beyond, the individual partners making the contract are bound, not the other partners. But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are, by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred."

See also opinion of Byles, J., in *Lewis vs. Mayor of Rochester*, 99 Eng. Com. Law, 426.

The act involved in the issue of the certificate in question in this case, and the defendant's liability therefor must be determined with reference to the rules of law affecting the acts of principals, as distinguished from the rules governing the acts of agents. The question, properly stated, is whether or not the principal has done an act for which it is in law liable, and not whether an agent has done an act for which the corporation is liable.

The only apparent conflict in the cases that have arisen in respect to certificates of stock, is mainly referable to this distinction between the acts authenticated by the official and legal representatives of a corporation, and those performed by a mere agent in the exercise of a delegated authority. In the case of the *Mechanics' Bank vs. The N. Y. & N. H. R. R. Co.*, 13 N. Y., 599, the question arose upon a certificate not under seal, signed by "Robt. Schuyler, Transfer Agent." The Court held first, that he was a mere transfer agent, acting under limited powers that could only

be exercised under specified conditions. His act purported to be nothing more upon the face of the certificate. pp. 601 and 612. The other leading doctrine of this case is, that a certificate of stock is a representation only to the party to whom it is issued, p. 638. We shall not cite the case at length; but content ourselves with the statement that in *R. R. Co. vs. Schuyler, et al.*, 34 N. Y., 30, the first thirty pages are devoted to showing that upon the facts as they were then presented to the Court, although Schuyler purported to act as a mere agent, nevertheless such had been his conduct through a series of years that the corporation must be held to have entrusted to him the full corporate power.

"It is transparent throughout the case," say the Court, "that the board of directors, by passive submission, or active surrender, handed over to Schuyler the substance of all their authority relating to their business in New York," and see p. 54.

Having thus established, what the case at bar starts with, that the certificates under the circumstances were the corporate acts of the company,—in this respect not overruling the Mechanics' Bank case, but showing how the facts upon the evidence presented a different case,—the Court proceeded to the second question, that the representation in a certificate of stock is addressed only to the party named as a stockholder upon the face of it. This doctrine is distinctly overruled.

"I cannot," says the judge delivering the opinion, "subscribe to the idea that the duties of the plaintiffs, in respect to their stock, were limited to themselves and existing shareholders. They extended also to the commercial community whose confidence and trade the plaintiffs invited, and who in turn were entitled to good faith and fair dealing at the hands of the company; and they sprang into

full vigor in behalf of every party who entered upon such dealing." p. 52.

There has been some controversy at the bar outside of the State of New York, as to how far the later of these cases overruled the earlier case. There seems to have been no difficulty in comprehending them, by the Courts in New York, although the former case is occasionally referred to upon the doctrine of the power of an agent to bind his principal by representations as to the existence of facts, or conditions precedent, upon which his power to act as an agent depended, while the latter case has left no doubt, in the New York Courts, at least, as to the character and force of a certificate of stock, when issued by the officers of a corporation under its corporate seal. We have cited several of these cases under our third proposition at the commencement of this argument.

These decisions in New York are re-inforced in their authority, by the opinions of the Court of Appeals of Maryland in a series of cases, beginning with:

Tome vs. The P. B. R. R. Co., 39 Md., 36.

It is a very elaborate case, argued by the ablest counsel. The action was founded upon the alleged wrong of the railroad company in repudiating certain stock certificates as spurious, which the plaintiff contended were either genuine, or issued under such circumstances, by its treasurer, under the seal of the corporation, and with the genuine signatures of its officers, as was claimed, as rendered the defendant responsible for their issue. There was a controversy in the case, upon which the Court was not unanimous, as to whether the president's signature was genuine or a forgery. That

part of the discussion has no bearing upon the case at bar. The Court was unanimous upon the proposition that if the signatures to the certificates were genuine, the fraud of the treasurer in issuing the certificates for his own purposes, and not those of the company, the plaintiff being innocent, did not affect the right of the plaintiff to recover.

By the same Court in *B. & O. R. R. Co. vs. Wilkins*, 44 Md., 11, the doctrine of the Supreme Court in *Pollard vs. Vinton* is laid down, and bills of lading are distinguished from certificates of stock.

Say the Court:

"The authority of such officers (who issue stock certificates) both real and apparent, differs widely in its extent and scope from that of a mere station agent. The instruments issued in those cases, are also of an entirely different character from those issued in this case. The distinction between them has been well stated in the brief of appellant's counsel. Stock in corporations is intangible property. Stock certificates are not promises to do anything with particular articles of property, but simply statements of ownership of shares or interests in property. It is the peculiar province of the treasurer and transfer agent, whom the company authorizes to give, and make such statements, to make known to the commercial public dealing with the stock, the facts of such ownership and to whom the shares belong. But a bill of lading performs a very different function. It evidences and is a contract for the transportation of goods, and not an instrument intended to give information as to the ownership of intangible property. The agent who signs it is not held out to the public as authorized to make statements like those in a certificate of stock, but only to make contracts to carry visible and tangible property. The property which is thus stipulated to be carried being visible and tangible, the fact whether it has been shipped or received at the depot for shipment or not, can be determined and easily determined in a multitude of ways without applying to the agent."

The doctrine of the Tome case has recently been re-examined and re-affirmed by that Court, in a case involving the proposition that the person receiving the stock was not put upon enquiry by the fact that it was issued to the agent of the corporation whose duty it was to fill it up. In *West. Md. R. R. Co. vs. The Franklin Bank*, 60 Md., and in January 1884 Number Am. & Eng. Corporation Cases, 46.

One of the most carefully considered decisions upon this general subject is that of *Bank of Kentucky vs. The Schuylkill Bank*, 1 Pars. Sel. Cases., 180.

That case also involved a large amount and is reported at great length. It is impossible to do more than extract statements of the propositions decided and the principles affirmed, from the opinion delivered by Edward King, the presiding Judge. The case involved the question of the liability of the Bank of Kentucky for an over-issue of its capital stock by its transfer agent, the Schuylkill Bank. The proceeding was in equity by the Bank of Kentucky to obtain indemnity from the defendant as its agent, for a liability incurred by the plaintiff, and which it had settled, to the holders of the spurious stock of the Bank of Kentucky. It was insisted by the defendant that the holders of the spurious stock had no remedy against the corporation of the Bank of Kentucky.

Say the Court, (p. 247):

While it is true, that in making a regular transfer of the stock of the bank, the principal bank at Louisville, and all its transfer agents, wherever situate, were required to receive the surrender and assignment of the preceding certificate from the holder thereof, it is not true that the purchaser of the stock of the bank is under any obligation to see that such surrender is made by the seller.

The obligation to surrender the old certificate, is not a limitation on the power of permitting transfers, so far as respects the bank. It is a provision introduced for the security of the bank, in order to prevent its being embarrassed between legal and equitable titles to its stock, and in order to secure to the bank any liens or claims on its stock, before transfer to third persons having no notice of such liens or claims. It is a provision almost if not quite universally introduced into American bank charters, or into by-laws made pursuant to them. It has been held, that a by-law requiring any extraordinary formality, or imposing an impediment in the transfer of shares would be void: *Sergeant vs. Franklin Insurance Company*, 8 Pickering, 90. * * * As between *vendor* and *vendee*, however, a transfer of stock will be valid, though the act of incorporation provide that no such transfer shall be valid or effectual till registered in a book kept for the purpose, and the debts due to the company be first paid: *Grant vs. Franklin Ins. Co.*, 8 Pick., 90; *Bank of Utica vs. Smalley*, 2 Cowen, 770. In *Grant vs. The Mechanics' Bank*, 15 S. & R., 143, Tilghman, C. J., says: that 'this restraint on the tranfer of stock was intended for the benefit of the bank.' How then can it be pretended that a purchaser of bank stock has any obligation imposed on him to see to the surrender of the old certificate and its due assignment, when that is a matter for the interest and consequent supervision of the bank itself, and provided and exclusively intended for its advantage? When he receives his new certificate, has he not the right to assume that the bank has attended to all things in the transaction necessary for its own protection? Who conducts the preliminaries resulting in the issue of his new certificate? Why, the bank itself, or, what is the same thing on this occasion, its agent lawfully constituted for this purpose. The idea that the purchaser of stock is to loose the property he has honestly paid for, because the bank has not done its duty to itself, is unreasonable to the last degree. It would seem strange indeed to an unsophisticated understanding, if such a notion could be invoked successfully to save the Bank of Kentucky from the results of its own misapplied confidence in a faithless agent. The true doctrine on this subject is, that, where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the conse-

quences of the act. * * * The *bona fide* holder of every certificate issued by either of these transfer agents, has a primary and direct claim against the Bank of Kentucky, either to be admitted as a corporator of that bank, or, if that is impracticable from the excessive issue of stock, to be compensated by the bank for the fraud practiced upon him. In *Davis vs. The Bank of England*, 2 Bingham, 393, 9 English Com. Law Rep., 464, although the question did not directly arise in the case, the Court of Common Pleas in delivering their judgment say, 'We are not called on to decide whether those who purchase stock transferred to them under *forged powers* might require the bank to confirm the purchase to them, and to pay them the dividends on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries. *But, to prevent, as far as we can, the alarm an argument urged on behalf of the bank is likely to excite, we will say, that the bank cannot refuse to pay dividends to subsequent purchasers of such stocks.*

If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank in the books which the law requires them to keep, and for keeping which they are to receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. *If this be not* law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? Now, if this is sound as to government stock transferred by forged powers, what is to be said of corporation stocks, originally spurious, but transferred from time to time, through the agency of the corporation itself, to innocent purchasers? Why certainly, as against the *bona fide* holders of such stock, the corporation would be estopped from going beyond its last certificate in any question arising between the corporation and such holder, touching the obligatory force of such certificate on the corporation. In our opinion, therefore, the complainants' title is good so far as they represent holders of spurious stock, whether such holders are the parties to whom it was issued originally, or whether they claim it by direct or remote succession from such original holders."

It is vain to say that, as to some of the certificates involved in this case, it was impossible to determine what were genuine and what were spurious. The Court evidently intended to place its opinion upon grounds which admitted of no such discrimination. It is equally vain to say that there were in the case transferees to whom certificates had been issued upon the surrender of spurious certificates. Doubtless there were such cases involved in the enquiry. But the Court, as is obvious from the language quoted as well as from the statement of facts and the decree rendered, made no distinction between such certificates and certificates that were issued without any apparent surrender of stock, and the decision is justly cited by the Court of Appeals of Maryland in support of the principles expressed in the *Tome* case. And the doctrine was followed quite recently in an inferior tribunal in the case of *Willis vs. Fry*, 13 Phil. (Pa.) Rep., 33.

There are numerous cases where the corporation has been induced to act, and to issue a certificate of stock upon a forged power of attorney and transfer indorsed upon the back of a certificate. It is conceived that when the force and character of the certificate is being considered, and the rights of a *bona fide* purchaser of such a certificate are in question, it can make no difference whether no certificate was surrendered, or a forged assignment was acted upon by the corporation. Such a case was the *Machinists Nat. Bank vs. Field*, 126 Mass., 345. It was sought to compel the innocent holder to whom such a certificate had been transferred, it being an over-issue of the plaintiff's stock, to surrender it to the bank. The bill was dismissed. Said the Court, Gray, C. J.:

"Dean (the holder of the certificate) cannot be or-

dered to return his certificate, because he purchased the shares in good faith and for valuable consideration, and the certificate issued to him is as against the bank conclusive evidence of his title. The bank has no right to compel him rather than any other stockholder to give up his certificate and thereby assume the responsibility of its own illegal act in issuing a greater number of shares than the law authorizes."

Among others the cases of *In re Bahia and San Francisco Railway Company*, L. R. 3 Q. B., 584, and *Holbrook vs. The Zinc Company*, 57 N. Y., 616, were cited by the learned judge. In the latter case, Dwight, J., delivering the opinion says:

"It can not now be denied, that if a corporation having power to issue stock certificates does in fact issue such a certificate, in which it affirms that a designated person is entitled to a certain number of shares of stock, it thereby holds out to persons who may deal in good faith with the person named in the certificate, that he is an owner and has capacity to transfer the shares. This proposition does not rest on any view of the negotiability of stock but on general principles appertaining to the law of estoppel. The rules of estoppel are of comparatively recent origin, and their applicability to this subject has only been lately perceived. They are now fully recognized in England and in this country as governing the present subject. In order to constitute a case of estoppel under principles now established, it is necessary to show that a representation has been made, with a view or expectation that it will be acted upon by another, that it has been so acted upon, and that a person relying upon the representation would sustain an injury or damage if it were withdrawn."

This doctrine has been so frequently stated by this Court, in municipal bond cases, that we should not feel warranted in seeking elsewhere for its reiteration, except for illustrations of it when applied to certificates of stock. In the case cited of *In re Bahia, etc.*, Cockburn, C. J., thus expresses the purpose and character of a stock certificate:

"This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates, is therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it s given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares."

The doctrine of these decisions is founded upon a convenience amounting to a practical necessity, unless the great business of the country in this class of transactions is to be entirely broken up by the adoption of different rules in regard to them by the Courts. The force of this argument of common usage and general convenience in this class of cases has been distinctly recognized by this Court in *Johnston vs. Laflin*, and repeatedly in other decisions.

It would paralyze all dealing in shares in corporations, if a person who dealt in certificates in the ordinary course of business, relying upon the representations by the company contained in the certificates, should not be permitted to rely upon the assertions of the certificate, but before he could obtain a valid title should be obliged to ascertain for himself, otherwise than by the certificate, that its representations were true. These dealings are generally had at commercial centres, at a distance from the office of the corporation whose shares are dealt in. If the purchaser was required to make the investigation, whether there had been a surrender and cancellation of a certificate for an equal amount upon the issue of the certificate which he is

about to purchase, it would be impossible for him to obtain such information. He has the official assurance of the company, by its president and cashier, that these facts are true and that the company has acted upon them in issuing the certificate. From whom is the purchaser to enquire? If enquiry of the president, the chief executive officer of the corporation would avail, he has his assurance in this most authentic form made in the performance of his duty. If the company is not bound because he has disregarded his duty in the issue of the certificate, what authority has he to speak for the company and to bind it by oral statements?

WAS THE PLAINTIFF PUT UPON ENQUIRY?

It was said, and this was the point on which the Court below rested its judgment, that the plaintiff was purchasing stock of the cashier, and knew that in making a transfer and issuing the certificate to her, he was acting in his own behalf as well as in the capacity of cashier of the defendant. And this, it is said, put the plaintiff upon enquiry and was equivalent to notice that he was acting fraudulently toward the bank. Of course, this argument ignores the presence and effect of the president's signature to the certificate, and denies that the plaintiff had any right to rely upon it.

But it was lawful for both the president and cashier to be the owners of stock in the defendant corporation. Indeed, the law in many of the states, as is the case in National banks, requires that the president of the corporation shall be a stockholder. The defendant itself describes by its by-laws but one form and mode of issuing its certificates of stock, whether they are issued to its president, or its cashier, or

to third parties. It was the defendant, not the plaintiff, that required the cashier thus to act in his official capacity, in conjunction with the president, in issuing certificates to himself, or in making transfers of his stock when he disposed of it to third parties. The plaintiff could not, if she would, when she purchased stock of the person who held the office of cashier, obtain a certificate for it, except in the precise form in which she did obtain it, over the signatures of the president and the cashier, and the seal of the corporation.

There is a class of cases, of which *Shaw vs. Spencer*, 100 Mass., 382, and *Ashton vs. Atlantic Bank*, 3 Allen, 217, are illustrations, in which it is held, that where a vendor holds a certificate of stock, or negotiable paper, which upon its face showed that he held it in a trust capacity, and the trust was such that he could not, ordinarily, rightfully dispose of it, a purchaser is put upon enquiry as to the extrinsic facts upon which the vendor's power to sell, and to make a good title to it, depends. But these cases, and as we conceive all similar cases in which this doctrine is applied, distinctly concede, indeed, the *Ashton vs. Atlantic Bank* case expressly affirms, that if the trust is such as that the vendor *may* rightfully dispose of the property, in the exercise of his duty as trustee, then no such rule applies, and that the purchaser may rely upon the presumption that the trustee is acting in the proper execution of his duty.

There is also a class of cases, to which the Circuit Court especially referred, where the cashier of a bank attempts to certify in his own behalf to his own check upon the bank. Of these *Claflin vs. The Bank*, 25 N. Y., 293, was referred to as an example. But we submit that these

cases are clearly distinguishable from the case at bar, and the case of *Claflin vs. The Bank*, was expressly so distinguished by the Court of Appeals of New York in the case of *Titus vs. The G. W. Turnpike Co.*, 61 N. Y., 237. In that case John C. McClure, as treasurer of the company, issued stock certificates bearing the genuine signatures of the president and treasurer, and the seal of the corporation, which certified that John C. McClure was the owner of 500 shares of the stock of the company. And upon the credit of those certificates as collateral security, John C. McClure borrowed money from the plaintiff, who, at the time, knew that said John C. McClure was the same person who signed the certificates as treasurer. It appeared that no surrender of any certificate was made to the defendant of the stock which the certificates in question purported to represent; but they were an over-issue of the stock of the company, fraudulently made by its treasurer upon the certificates signed by the president in blank, for the purpose of enabling the treasurer to make transfers in the president's absence. Say the Court, in disposing of the case, and holding the company liable for the amount advanced upon these certificates:

"The directors of the defendant, were authorized to make by-laws, rules, orders and regulations, not inconsistent with the laws of this State or of the United States, as they might deem necessary for the well ordering and management of the affairs of the corporation. The shares of its stock were declared to be personal estate, transferable on its books. In pursuance of the authority thus given, the directors passed certain by-laws, by which they prescribed the form of certificates to be given for the stock of the defendant to the owners thereof, which, under a general resolution of the directors, were to be signed by its president and treasurer. * * * The by-laws required the signature of the president and treasurer thereto, and that the seal of the corporation should also be affixed to it. There was no by-law

of the defendant making any exception as to the form of the certificate, or as to the officers who were to sign it when it was issued to the treasurer or president. It will thus be seen that the directors of the defendant, with knowledge that the act of the legislature incorporating it required its president to be a stock-holder, nevertheless authorized and required him to sign every certificate of stock that was to be issued. Such a certificate is the only evidence which a stockholder receives of the ownership and title to the stock held by him. And if the decision of the referee (holding that the plaintiff was put upon enquiry) was right, it would follow that there was no authority conferred on any person to give to the president any certificate showing that he was the holder of stock standing in his name on the books of the company, and consequently that he could not hold any evidence of his title thereto. There is nothing disclosed to show that there was any intention of the directors to prohibit the issue of a certificate to him in the form prescribed by them; nor was there any reason or necessity why such an exception should have been made, or why it should be implied. * * * The regulation prescribed for the issue of certificates did not give the right or authority to the president or treasurer alone to do it, but it required, as above stated, the signatures of both of them, and in addition thereto, the seal of the defendant, which is the highest evidence of a corporate act. It may, therefore, be properly assumed that, as no spurious or false certificate could be issued, except by the act of its president (its confidential officer), it was not deemed necessary to make any exception as to his power or that of the treasurer in giving the usual evidence of the ownership of stock held by either of them, and that it was intended that their certificate should be in the same form and signed by the same officers as that issued to any other stockholder.

There is nothing in the decision in the case of *Claflin vs. The Bank*, 25th N. Y., 293, which decides or declares a principle that the certificates issued in conformity with the by-law or regulation of the defendant hereinabove referred to, were invalid because they were signed by the treasurer. In that case the president of a bank, having a general authority to certify checks upon it as good, certified, in his character of president, checks drawn by himself, individually, to be good, and it was held that the certificate was virtually an accept-

ance of the check by the bank, and that the general authority to certify the checks of its dealers did not authorize him to declare his own to be good, and thereby charge the bank with the amount thereof. It was well said by Parker, J., in giving the opinion of the General Term on the reversal of the the referee's decision in the present case (reported in 5 Lansing, 250): "That presumptively, the intention of the bank in giving the general authority did not include such a case, one out of the ordinary course of business and contrary to business and legal rules, and one entirely unnecessary to the ordinary course and management of the business of the company. * * * but in regard to certificates of stock, they are the necessary parts of the machinery by which the business of every corporation is carried on. * * * In the case at bar the resolution does not, as in that case, authorize the making of *contracts* for the company, but it *directs* the performance of a mere ministerial act, necessary to the orderly conduct of its business in regard as well to the officers stock as to that of other stockholders. * * *

There is another and a very material distinction between that case and this. The power there conferred was given to the president alone, and was exercised, if intended to be exercised, without the seal of the bank; but here the signature of the treasurer alone was not sufficient. That of the president, and, in addition to both, the corporate seal of the defendant was required to be affixed. The certificates presented to the plaintiff, on the faith and credit of which he parted with his money, conformed to all those requisitions. The ownership of the stock by the treasurer was therefore not certified by the party in interest alone; whereas the certificate by the president of the bank, in his official capacity, that his individual check drawn on it was good, was made by the same person who was to receive the benefit of it, and was signed by no other officer of the institution. That difference clearly distinguishes the case of *Claflin* (*supra*), from the present, not only in the character of its material facts but in principle. It follows from what has been said that the first conclusion of law by the referee, that the general power given to the treasurer did not authorize him to sign certificates in his own name was erroneous, and consequently the second based thereon, that this defect

appearing on the face of those taken by the plaintiff charged him with notice of their invalidity was without foundation and therefore also erroneous."

A like doctrine was either expressly held or necessarily involved in the cases cited:

Western Maryland R. R. Co. vs. Franklin Bank, 60th Md.

Bridgeport Bank vs. Railroad Company, 30 Conn., 270.

Willis vs. Fry et al., 13 Phil. (Pa.), 33.

It is said by the Court in its charge that the plaintiff was purchasing her stock of Robert B. Moores, which was enough to put her upon enquiry. We repeat, enquiry from whom? She had the solemn assurance of the president and of the cashier in their official capacity, and the seal of the corporation. Should she have addressed her enquiry to the teller or the book-keeper of the bank? If she ascertained that Robert B. Moores stood upon the books of the bank, as the owner of two hundred and seventy-five shares of the stock of the corporation, from whom was she to ascertain that a surrender of ninety-one shares thereof had been made to the president and treasurer, and by them cancelled in the proper performance of their duty when the certificate to her was issued?

THE ERROR IN EXCLUDING EVIDENCE.

The case presented two facts as the ground of the action. First. That the certificate was issued by the defendant. Second. That the defendant fraudulently permitted the transfer of all of the stock held by Robt. B. Moores to other persons after the issue of the certificate to plaintiff. The

petition did not allege that the certificates for such stock held by Moores were surrendered or cancelled at the time of the issue of plaintiff's certificate. The transfer of such stock to the plaintiff, as between herself and Moores, was complete without such surrender or cancellation, and without a transfer upon the books of the bank. The registration of the transfer, and the surrender of the prior certificates, were for the convenience and the protection of the bank, and exclusively under its control. As between Robt. B. Moores and the plaintiff, in the language of this Court in *Johnston vs. Laflin*, 103 U. S., 804:

"The title to the shares then (upon the delivery of the certificate) passed; whether that be deemed a legal or equitable one matters not; the right to the shares then vested in the purchaser."

See also *National Bank vs. Watsontown Bank*, 105 U. S., 217.

From that time the bank was chargeable through its cashier with knowledge of the plaintiff's title. And it could not subsequently acquire from Moores the very stock thus owned by the plaintiff. It was upon this theory that this Court in this very cause decided,

"That the sustaining of the demurrer (to the reply of coverture) deprived the plaintiff of the right to insist upon the ground of action, which was open under the petition, that the defendant more than four years before the action was brought, permitted and procured the transfer upon its books to other persons of shares of which the plaintiff had the certificates." 104 U. S., 630.

How then could the Court below, of its own motion, exclude the record of the resolutions of the directors of the defendant corporation, showing that its board of directors, long after the certificate was issued to the plaintiff, procured

and confirmed the transfer of the very stock, which, at the time when her certificate was issued, stood in Moores' name upon the defendant's books, to the president of the bank in trust to secure an indebtedness due from Moores to the bank? No lien of the bank for Moores' indebtedness to it upon the stock in question was alleged or proved.

The authority of *Case vs. Bank*, 100 U. S., 446, as well upon the liability of the defendant for negligence, as for the invalidity of any claim for such a lien, is in point. The case of *Bridgeport Bank vs. R. R. Co.*, 30 Conn., 270, sustains the propositions that this stock of Moores became the plaintiff's when the certificate was delivered to her, and that the cashier's knowledge was notice to the bank of her title to it. The latter point is also held in 34 N. Y., 84, in the *Schuyler case*. We are at a loss to know upon what ground this action of the Court below will be defended. If it be said that the testimony of R. B. Moores tended to show that his stock was hypothecated to third parties, at the time when the certificate was issued to plaintiff, then surely that evidence in connection with this testimony offered by the plaintiff and excluded by the Court, presented a question of fact for the jury. Upon no ground that we can conceive of was the Court warranted in excluding this evidence, and in withdrawing this question from their consideration.

If, indeed, his stock had been hypothecated by Moores, subject to the lien of the pledgee, the title to it must have passed to the plaintiff, as between herself and Moores. Stock, in this respect, is like other personal property. If the owner sells it by a valid contract of sale, the title to it passes to his vendee, even although it may be subject to a

lien in favor of a third party. If it be said that there was no setting apart of the ninety-one shares sold to plaintiff out of the two hundred and seventy-five shares held by Moores; we answer that as against him, any ninety-one shares, or for that matter, any lesser number than ninety-one shares which it turned out, upon the discharge of the prior liens, Moores held the legal and beneficial title to, would become the plaintiff's property. That was necessarily the view taken in the cases cited, and by this Court in this case when it was formerly decided by this Court. There was no claim in either of these cases, nor in this case, that the precise number of shares, out of the larger number owned by the vendor, were set aside or surendered by the vendor on account of the certificates that were held, in these cases, to pass the title to his vendee. That he at the time owned stock, which, as it turned out, he could transfer, was sufficient as between him and the plaintiff, to entitle her to have it surrendered and cancelled in support of her certificate. He was estopped to deny its transfer to the plaintiff. And the bank, chargeable with notice of the facts, could derive no better title from its cashier than he could himself assert against the plaintiff.

Let us suppose that this action was against Robert B. Moores to enforce the surrender and cancellation of the certificates of certain of the very stock held by him when Mrs. Moores acquired her certificate. Would he be heard to affirm that he did not surrender it when her certificate was issued, because it was then hypothecated, and therefore Mrs. Moore derived no title to it? And does the bank deriving title from him, with notice of the fact of the issuing of plaintiff's certificate to her, stand in any better

position than Moores himself would stand in? Certainly a presumption, at least, arose in the plaintiff's favor, when she produced a certificate of the defendant regularly executed by the defendant, under its seal and the genuine signatures of its officers, that every requisite fact existed and every act had been done to render it valid. If we disregard the doctrine of estoppel, it at least devolved upon the defendant to show that under no circumstances could this certificate represent valid stock. It was not enough to show that no surrender was made by Moores, and no transfer registered on the defendant's books. It must at least show that Moores owned no stock the title to which did or might pass to the plaintiff, and be represented by her certificate.

This principle, often expressed by this Court when considering the validity of municipal bonds, may be found in connection with another proposition applicable to the case at bar, very fully stated in the *Merchants Bank vs. The State Bank*, 10 Wal., 644. The two propositions are thus stated by the Court in that case:

"Where a party deals with a corporation in good faith—the transaction is not *ultra vires*,—and he is unaware of any defect of authority, or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

Again, on p. 646:

"In the *Bank of the United States vs. Davis*, 2 Hill., 465, Nelson, Chief Justice, said: 'The plaintiffs appointed the director and held him out to their customers and the public as entitled to confidence. They placed him in a po-

sition where he has been enabled to commit this fraud.' * * * The same principle was applied in the *New York & New Haven Railroad Co. vs. Schuyler*. It was explicitly laid down by Lord Holt in *Hern vs. Nichols*, 1 Salkeld, 289. He there said: 'For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger.'"

This latter proposition has had frequent application in the administration of the law.

Weirick vs. Mahoning Co. Bank, 16 O. St., 296.
Insurance Co. vs. Eshelman, 30 O. S., 647.
Burson vs. Huntington, 21 Mich., 414.
Pompton vs. Cooper Union, 101 U. S., 196.

The questions presented in this discussion are of such great commercial importance, their determination by this Court is necessarily so far reaching in its effects, as that the amount involved in this particular case becomes of comparative insignificance. We feel assured that their consideration by the Court will not be limited by any want of thoroughness or fullness in this argument, as submitted by us, but will be commensurate with the great interests to be affected by their determination.

E. W. Kittredge,
John W. Warrington,
M. C. Shoemaker,
For Plaintiff in Error.

111456

Supreme Court of the United States.

Caroline A. Moores,

PLAINTIFF IN ERROR.

— vs. —

The Citizens National Bank of Piqua, Ohio,

DEFENDANT IN ERROR.

Brief for Defendant in Error.

WILLIAM M. RAMSEY,
Counsel for Defendant in Error.

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Supreme Court of the United States.

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— vs. —

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DEFENDANT IN ERROR.

Brief for Defendant in Error.

STATEMENT OF FACTS.

Shortly prior to July 15th, 1867, Robert B. Moores, who was at that time Cashier of the Citizens' National Bank of Piqua, agreed to transfer to the plaintiff, the wife of his brother, John B. C. Moores, shares of stock in said bank of the par value of $9,100. The transfer was to be made as collateral security for the sum of $9,100, which plaintiff agreed to loan. The negotiations leading to the transaction were between R. B. Moores, his brother John B. C. Moores, (plaintiff's husband) and their father, Wm. B. Moores, now deceased. On July 15th, 1867, an agreement was signed between R. B. Moores, Wm. B. Moores, John B. C. Moores,

and the plaintiff, in the words and figures following, to-wit:

"For value received, namely, the sum of ninety-one hundred dollars, Robert B. Moores has assigned and transferred to Caroline A. Moores, ninety-one shares of stock of the Citizens' National Bank, of Piqua, Ohio.

Now, it is agreed that the said Caroline A. Moores, shall, upon demand by Robert B. Moores or his assigns, reassign to said R. B. Moores the said stock for the same amount. And it is also agreed, that whenever the said Caroline A. Moores shall require it, the said Robert B. Moores shall purchase said stock at the amount aforesaid, and pay the same to her in cash. And in the meantime, it is agreed, and the said Robert B. Moores and William B. Moores do hereby guarantee and assure to said Caroline A. Moores, an annual dividend upon said stock of not less than ten per cent. upon the par value of said stock, namely, ninety-one hundred dollars, which guaranty shall be performed and fulfilled at the end of each year herefrom, or at the time of each dividend declared, if such dividend shall be declared oftener than once a year, and all deficiencies in said dividend shall be made good at the time of such repurchase or transfer to R. B. Moores.

In witness whereof, the said Caroline A. Moores and John B. C. Moores, her husband, and Robert B. Moores, and William B. Moores hereunto set their hands on this 15th day of July, 1867.

(Signed) CAROLINE A. MOORES,
J. B. C. MOORES,
ROBERT B. MOORES,
W. B. MOORES."

This agreement was made at Cincinnati. R. B. Moores returned to Piqua, and on the 15th day of July wrote to his brother, John B. C. Moores, that he had made the transfer of the stock, and enclosed a certificate in the usual form, reciting that the plaintiff was the owner of $9,100 of the stock of the bank. The certificate is as follows:

"THE CITIZENS' NATIONAL BANK OF PIQUA,

STATE OF OHIO.

STAMP. No. 56. 91 Shares.

This is to certify that Mrs. Carrie A. Moores is entitled to ninety-one shares of one hundred dollars each of the capital stock of *The Citizens' National Bank of Piqua*, transferable only on the books of the bank, in person or by attorney, on the surrender of this certificate.

PIQUA, O., July 15, 1867.

(Signed)

ROB'T B. MOORES, *Cashier.* G. VOLNEY DORSEY, *President.*"

On or before the receipt of this paper, John B. C. Moores, on behalf of his wife, paid, $9,100 to Wm. B. Moores, for whose benefit the transaction had been made.

The certificate remained in plaintiff's hands for some years without any communication from her to the defendant, the defendant being ignorant of its existence until the year 1872. Wm. B. Moores was a creditor of the plaintiff's husband to the amount of $20,000. He settled the interest with plaintiff's husband, and finally settled the principal, by taking his note for $9,100, which was cancelled, or at all events, never presented for payment. This settlement plaintiff repudiates, alleging that it was without her knowledge or consent.

The facts concerning the issue of the certificate are as follows:

R. B. Moores was appointed cashier May 1st, 1867. Prior to that date, all of the stock of the bank had been taken. The president of the bank, Hon. G. Volney Dorsey,

had been requested to append his signature to a few blank certificates, to be used for the purpose of making transfers, should applications for transfer be made during his absence from the bank, and had complied with the request.

R. B. Moores, without the knowledge or consent of any officer of the bank, had taken one of these blanks, filled it up in favor of plaintiff, and delivered it to her husband for her. No entry relating to the transaction was made upon any book of the bank. The entry on the stub of this certificate is "destroyed," indicating that the body of the certificate had been torn out and destroyed. No transfer of stock was made to the plaintiff at any time.

On this state of fact, the defendant refused to recognize the plaintiff as a stockholder, and she brought this action claiming $9,100 damages for such refusal.

R. B. Moores appeared upon the books of the bank on July 15th, 1867, as the owner of a considerable amount of the capital stock, for which certificates had been issued to him, but prior to that date, he had pledged to *bona fide* holders, all of said certificates, and was not the owner in fact of any stock in the bank at or after said date.

The defendant bank had in force at all times from the date of its organization, by-laws, secs. 15 and 16 of which related to the subject of stock certificates and transfers, and were as follows:

TRANSFERS OF STOCK.

SEC. 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act; and a transfer book shall be kept,

in which all assignments and transfers of stocks shall be made.

Sec. 16. Certificates of stock signed by the president and cashier may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred the certificates thereof shall be returned to the bank and cancelled, and new certificates issued.

The National Bank Act makes no provision upon the subject of stock certificates or transfers, other than that which is contained in sec. 5139 Rev. St., to the effect that capital stock shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association."

HISTORY OF CASE.

The action was commenced March 24th, 1873. At October Term, 1878, trial was had upon submission to the Court, resulting in judgment for the defendant, which this Court reversed at October Term, 1881. The reversal was upon technical grounds, to which it is not necessary to refer. The opinion is reported in 104 U. S., 625.

A second trial resulted in a similar judgment, and the plaintiff brings the cause here by writ of error. The opinion of the Circuit Judge Hon. John Baxter, will be found in 15 Fed. Rep., 141.

ARGUMENT.

The action is brought upon the theory that the defendant may be held responsible for the wrongful action of R. B. Moores, by an application of the doctrine of *estoppel in pais*, the estoppel being founded upon the alleged negligence

of the company in entrusting Moores with the blank certificate, with the president's signature affixed. The action can not be sustained upon this ground. It has no foundation either in principle or authority. The following considerations are presented in support of this denial:

The action is for a false representation, or rather, two false representations, one of which was verbal, the other written—the verbal one being to the effect that R. B. Moores had transferred $9,100 of his stock to plaintiff; the written one being the statement that the *plaintiff was the owner* of stock to the amount named. Both of these representations are declared upon. The petition states that plaintiff

"Relied upon the representations of said Robert B. Moores, as cashier and officer of the defendant; that said certificate was duly issued, and that the stock had been duly transferred by said Robert B. Moores to the plaintiff on the books of said bank, *and* said plaintiff relied upon said certificate," etc.

It was necessary for the plaintiff to declare upon both. She could not stand upon the verbal representation alone, because manifestly that was his individual affair. She could not stand upon the certificate alone, because she knew that she did not own $9,100 of defendant's stock, and could not, therefore, be deceived by a statement to that effect in the certificate. Hence, the statement of R. B. Moores, that he was the owner of shares which he had transferred to plaintiff, must have been relied upon, in order to justify her reliance upon the certificate. If neither statement would have been sufficient to produce the injury—if the concurrence of both was necessary—then the defendant is not liable unless it can, upon some principle of law, be made responsible for both. It is not liable for either:

1st. As to the Verbal Statement.

This statement was made by R. B. Moores in his own business, and in furtherance of his own interest. The bank had no connection with it in any way, and plaintiff did not understand, and could not have understood, that he was representing the bank. The bank did not ratify or benefit by the transaction.

2nd. As to the Written Statement.

So far as the verbal statement is concerned it is too clear for argument that the defendant cannot be held responsible for it. So far as the certificate itself is concerned, it is plain that:

1. Plaintiff must stand upon it alone, defendant not being responsible for the individual statement of a stockholder as to the ownership and disposition of his stock. It follows that the certificate itself did not produce the injury. Plaintiff did not rely upon it alone. She could not rely upon it, as she knew that she was not entitled to the certificate, except as a purchaser from Moores, *and she had only his word that he was her vendor and transferror.*

2. A certificate of stock is a non-negotiable instrument, and the buyer takes the title of the seller only.

3. Plaintiff knew that she was dealing with an agent who was dealing, not in the business of his principal, but in his own business, and that the certificate was adverse to his principal. This put her upon inquiry.

4. Corporations are liable for the acts of their agents to the same extent, that private persons are liable for the

acts of their agents, and the same principles of law determine the question of liability in each case.

5. A principal is liable for a misrepresentation of his agent, only when it is made:

1. In the course of his employment.
2. Within the scope of his agency.
3. Upon behalf of his principal.
4. Where the principal receives and *voluntarily retains* the benefit of the misrepresentation, which is ratification.

6. The defendant cannot be estopped, and made liable upon the ground of negligence, because:

1st. The only negligence charged is that the defendant entrusted the cashier with the president's signature appended to the blank certificate. This is not negligence *in fact*, because:

1. A principal has a right to assume that his agent will act honestly, and it is not negligent to act upon that assumption.

2. The cashier of a bank is in a position of great trust and responsibility. He has the custody and control of the currency and negotiable securities of the bank, and may, if dishonest, embezzle the same. It cannot be negligent to entrust such an officer with a mere non-negotiable instrument, signed in blank.

2nd. This is not negligence *in law*, because there was no relationship between plaintiff and the bank which imposed the duty of care upon the latter toward the former. She was not a stockholder, or in any contract relation with any one touching stock. Stock can only be acquired, and the re-

lationship of stockholder and corporation established, by a subscription to capital, made directly to the company, or by the purchase of shares from one whose title can be traced back to the subscription list.

3rd. It is not actionable negligence, because:

1. It was not the proximate cause of the injury.

2. Mere negligence will not create *estoppel in pais*. It must be gross negligence, so gross as to be the legal equivalent of fraud.

3. Estoppel never arises upon the representations of a non-negotiable instrument. There must be injurious conduct *dehors* the instrument itself, directly inducing the action of the plaintiff which caused the loss.

7. The plaintiff in this case was guilty of contributory negligence.

The questions for discussion herein are thus shown to belong to the law of agency, and the law of negligence. I will speak of them in this order.

Agency.

The contract between plaintiff and her husband, upon one part, and R. B. Moores and his father upon the other, was made in Cincinnati, an hundred miles from defendant's banking-house. It is in form a contract of sale, but in substance a pledge of the pretended shares. The bank is nowhere mentioned. R. B. Moores' official character is not alluded to. The money was borrowed, not for the bank, but for R. B. and W. B. Moores. Indeed, the petition, alleges a contract only between herself and R. B. Moores. She alleges an oral representation by him to her, to the effect

that he had surrendered a certificate for ninety-one shares, and procured another in lieu thereof in her favor. This representation was made for the purpose of inducing her to enter into a contract with himself. If so, it was made in his own interest, in furtherance of his personal plans, and not those of his alleged principal. In the inquiry as to the liability of a defendant for the acts of an alleged agent, it is of no importance that the relation of principal and agent actually subsisted. The essential questions are: Was the particular act in question done by the alleged agent, as agent for the defendant? Was it done in the business of the defendant, *i. e.*, in behalf of the defendant? Unless these questions are required to be answered affirmatively, no question arises as to the extent of the agent's authority; because, if he did not attempt to bind the defendant, it is immaterial whether he had authority to do so or not. For the same reason, none of the other usual collateral inquiries arise, to-wit: Whether the defendant held the alleged agent out as possessing authority to bind him, or was otherwise guilty of negligence in that connection. If the contract is the agent's individual contract, it binds only himself, *and whom the contract binds, is alone bound by representations made as inducements to it.*

The cashier of a bank is an agent, possessing certain well-defined powers ordinarily. Whilst in the exercise of these powers in the usual and ordinary course of the business of the bank, and acting upon its behalf, the bank is bound. Ordinarily, his office does not invest him with any power to sell or pledge shares of the bank's stock. He is not clothed with the appearance of possessing such authority. In the present case, the bank had no shares to

sell. The petition alleges that all of its stock had been sold, and that the proper certificates therefor were outstanding. The representation, therefore, which he made to her, can not possibly affect the bank in any way, as it is purely his individual business. This does not, of course, determine the question as to the liability of the defendant for the consequences of the misuse of one of its certificates; but it demonstrates that for the fraud perpetrated by Moores, *the bank is not liable as a principal, as and for the act of an agent.*

The act was not within either the real or apparent scope of Moores' agency.

Happily, there is no room for doubt or disputation as to the real scope of his duties in connection with the stock and stock certificates of defendant. The law strictly defines his duties. All of the authorized capital having been subscribed, and original certificates issued to the various persons entitled prior to July 15th, 1867, the bank itself had no power or capacity to issue further certificates. It had no power to permit the transfer of shares upon its books without the surrender and cancellation of a certificate already outstanding. This was an indispensable condition precedent to the existence of the power in the bank itself. Its disregard of this limitation upon its powers would subject it to an action.

Lanier vs. Bank, 11 Wall. 369.
R. R. vs. Schuyler, 34 N. Y., 30.

If the bank could not issue such certificate, of course, the cashier could not do so. Was he held out as having any greater power in this behalf? Certainly not. The bank

never authorized, or attempted to authorize, transfers upon any other terms. He never professed to have such power. On the contrary, as we have before stated, the petition alleges that he did represent to the plaintiff that, in this instance, he had transferred shares to her—shares of which he had been individually the owner theretofore, *and that she relied upon such statement.* Hence, his real and his apparent authority were the same in this respect. He had authority to make a transfer upon the books of shares purchased by an individual from the owner, upon the production by the vendee of the certificate, evidencing the ownership of the particular shares, and its surrender. He could then, and not until then, issue a new certificate, *and plaintiff knew it.* Plaintiff knew that she was not entitled to the certificate in question, unless she had previously purchased Moores' shares and caused the surrender of his certificate. The bank made no statement to her upon this subject, and no agent of the bank had either real or seeming authority to make any representation to her upon the subject. Representations upon this branch of the subject are made *to* the bank, and not *by* it; the vendee of shares notifies the bank that he is a vendee and produces a certificate duly transferred to himself in support of his claim. The bank does not notify him. This fact necessarily comes to his knowledge first in the order of events. Nor did any agent of the bank profess to make such statement to plaintiff. The statement was that of R. B. Moores alone.

"In the exercise of the duties of a general agent, the liability of the principal depends upon the facts: first, that the act was done in the exercise, and, second, within the limits of, the powers delegated." (5 Wheaton, 336.)

The bank had no stock to sell or hypothecate, and, consequently, could have no agent to make such sale or pledge. Nor did Moores assume to act upon its behalf. The plaintiff fully understood that he was dealing with her in his individual capacity only. She was admonished by the certificate itself, and by the verbal statement of Moores, as alleged in the petition, that stock was "transferable only upon the books" of the bank. The law, which she was bound to know, so advised her. The by-laws, of which all were bound to take notice in dealing with the stock, so provided. She knew, therefore, from all of these sources, that she could not rely upon the certificate alone, and she did not do so. Hence, she cannot impute her loss to the defendant unless the oral statement of Moores binds it.

One can become a stockholder in a corporation in two ways only:

1st. By subscribing to the capital. Persons who subscribe and pay for shares receive certificates evidencing their title. The issue of certificates in the form used by the Piqua Bank is in accordance with a well known usage throughout the country. The law requires their issue in some States. It does so in Ohio. The National Bank act authorizes provisions upon the subject by by-laws, and a by-law, which is reasonable and lawful, has the force of statute law.

The plaintiff was not a subscriber to the stock of defendant, and knew that she was not, and knew that she was not entitled to a certificate as such. In the nature of things, she could not be deceived as to that subject.

2nd. One may become a stockholder in but one other way, to-wit: by purchasing stock from one who was either a

subscriber, or whose title by purchase from preceding holders can be traced back to a subscription. Such purchase and sale can be effected without the concurrence of the corporation, but it can only be done by the transfer from vendor to vendee of a certificate which the corporation had previously issued.

The plaintiff knew this. Her petition shows this, and she was bound by law to know it. She never received such a certificate, or made such purchase. Hence, there never was a time when defendant's cashier was called upon to do any act of agency in connection with the plaintiff She never held a stock certificate, and never was entitled to one, not being a stockholder, by either legal or equitable title, and she was never in position to call upon the officers of defendant to act in reference to a transfer. As that was the only thing, so far as stock and stockholders were concerned, as to which these officers had any functions to perform in the course of their agency, it was impossible for either of them to do anything upon behalf of their principal, either actually or ostensibly, and it was impossible for any one to be deceived by any representation made upon the subject, upon which any one had a legal or moral right to rely. Mrs. Moores knew as well as R. B. Moores, that she was not a stockholder unless the verbal statement made to her by him was true. If she chose to rely upon that in a dealing which was wholly between members of the Moores family, she cannot make the bank, which was a stranger to them and to the transaction, responsible for the consequences.

There is but one decided case in the law books which gives any color to such a claim, and that case decides that

an agent, may forge his principal's name, and thus bind the principal! (39 Md., 36.)

Where the written instrument is not sufficient to cause the injury, but must be and is supplemented by a false verbal statement, the author of the writing alone is not responsible.

An authority, bearing directly upon this point, is *Merchants' Bank vs. Livingston*, 74 N. Y., 223. L. had indorsed and delivered to a broker, a certificate of stock, as collateral. The broker pledged the certificate to an innocent purchaser for a large sum. L. was held estopped in the trial Court, upon the authority of *McNeil vs. Bank*, 46 N. Y. Reversed, on the ground that the certificate, with the blank indorsement, did not import a power to pledge and, as the broker had stated that he was borrowing for L. the lender assumed the hazard of the truth of the statement. Yet there, as here, it was said that the verbal statement would have been harmless, but for the corroboration afforded by the certificate. Referring to *McNeil vs. Bank*, and similar cases, the Court say:

"But this case is distinguishable from those. Barrett did not claim to be the owner of the stock. He represented that it belonged to his client, and by that must have been understood to mean Livingston, whose name appeared in the certificate as the owner of the stock; and he represented that he wanted a loan for this client. He had no authority, in fact, to make the loan for him, and he had nothing to show that he had such authority. He was clothed with no apparent authority to make such loan. The power of attorney gave no such apparent authority. There was nothing in that showing any connection with a loan, and that added nothing to his apparent authority. All the plaintiff had then, when it made the loan, was the naked assertion of Barrett that he was acting for Livingston; and upon that assertion it relied at its own risk. It could not hold Livingston for the loan; and this being so, what right had it to

take and hold Livingston's stock? Knowing that the stock did not belong to Barrett, it could not take it as security for a loan to him. It, at most, had information that Barrett could only pledge the stock for a loan to Livingston; and if he was not authorized to make the loan, he was not authorized to make the pledge. At the very most, the appearances indicated that Barrett was authorized to pledge the stock for an authorized loan, but not for a loan which he was not authorized to make.

"In such a case, the doctrine of estoppel does not apply. Livingston did not hold Barrett out as authorized to borrow money for him; and hence he is not estopped from denying such authority. He did not hold him out as authorized to pledge his stock for such a loan; and hence he is not estopped from disputing the pledge."

So far as any duty of Moores touching the stock of the bank was concerned, he had no duty to perform, touching certificate No. 56. No stock was transferred by any one, by means of that certificate. The cashier's duty as to stock transfers was within a very narrow limit at all times. He was strictly a *special agent*, as to that duty. He had no discretionary power. He could make no contract affecting the ownership or disposition of stock. His duty was purely clerical. He was required to accept the surrender of stock certificates, cancel them, and issue new certificates in lieu of them. It was not legally possible for him to do anything else. He could not be supposed by any one dealing with him to have any other power or authority.

How, then, can the bank be bound by the act of Moores?

The question of liability of a principal for the deceit of his agent, has been much discussed in England during recent years, and is now apparently well settled.

In *Udell vs. Atherton*, 7 H. & N. 172, it was held, by

an equally divided Court, that, where an agent had sold a mahogany log for his principal, by means of false representations as to its value, that the injured party could not sue the principal, who had not authorized the falsehood, although he had received and retained the purchase money.

In *Barwick vs. English Joint Stock Bank*, 2 Exch., 259, it was held, that, where the manager of a bank gave a guaranty to one who was dealing with a customer of the bank, the object and the effect of which was to induce the plaintiff to deliver oats to the bank's customer, under the expectation that the proceeds would be received by the bank, and paid to plaintiff, but with the real intention, on the part of the manager, that such proceeds should be held by the bank, and applied upon its claim against its customer, which was done, that the bank was liable for the fraud. The Court approved *Udell vs. Atherton*, and put the judgment upon the ground, that the fraud was committed upon behalf of the principal, and that it had received the benefit of it. The Court says:

"The general rule is, that the master is answerable for every such wrong of the agent as is committed in the course of the service, *and for the master's benefit*."

In *McGowan & Co. vs. Dyer*, L. R. 8 Q. B. 141, it appeared that a company, of which C was a managing director, had employed D. & Co. to perform some work. By an arrangement to which the company was privy, the proceeds were to be paid to plaintiffs. C. wrongfully procured D. & Co. to appropriate the funds to the payment of a debt to himself individually. *Held*, that the company was not responsible, as C. was acting for himself in that behalf.

BLACKBURN, J., delivering the opinion, says:

"On the second point, we agree that there is not any reason for holding the company responsible for the manner in which Christie received payment of his own private debt, though he happened also to be their managing director.

"In *Story on Agency*, the learned author states, in Sec. 452, the general rule that the principal is liable to third persons in a civil suit, for 'the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment*, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.' He then proceeds, in Sec. 456: 'But, although the principal is thus liable for torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit.

"Christie, as managing director, had a most extensive authority to act for the company; and we do not at all question that the company must be bound by every act of his, when acting for them, within the scope of that extensive authority. But what he did here was in his private capacity, receiving payment of his own individual debt; and, extensive as his authority was, that act did not come within it. We see no principle on which the company should be liable for what he did, any more than an ordinary employer would be answerable for the act of his agent not acting within the scope of his authority.

"It could not be said, if goods or funds pledged to a surety, were improperly taken by a person acting for himself, that the surety would be discharged, if it could be shown that the wrong-doer was a clerk, or other agent, of the principal creditor, though not acting, in any way, for his employer when he did the wrongful act, nor in pursuance of any authority, express or implied, from him."

In *Swift vs. Winterbotham*, 8 Q. B., 244, it was held that a bank was liable for a false representation made by its manager as to the solvency of an individual. The representation was made in a letter signed by the manager as manager.

The case was reversed.

See L. R. 9 Q. B., 301.

The subject is much discussed in *Mackay vs. Commercial Bank of New Brunswick*, L. R. 5; Privy Council, 394. A failing debtor exhibited to the bank in New Brunswick a telegram from plaintiffs in Liverpool, to the effect that plaintiffs would refuse his drafts unless provision was made for them by him. A false telegram was sent by the manager of the bank to the plaintiffs, which induced them to accept and pay the drafts. The bank obtained the benefit. Held, that the bank was liable, for this reason only. The Court distinctly held that the sending of the telegram was not within the scope of the manager's employment. Commenting on the charge to the jury, the Court says:

"The Court appear to treat the question whether or not Sancton was acting within the scope of his authority as a question of law, and hold that Mr. Justice Weldon, instead of directing the jury that the sending of the telegram was within the scope of Sancton's authority, ought to have directed them that it was not. The only question of fact which they direct to be submitted to the jury is, whether or not the sending it was sanctioned by the directors. * * * Their lordships regard it as settled law, that a principal is answerable where *he has received the benefit* from the fraud of his agent, acting within the scope of his authority."

The case of *Lowell Savings Bank vs. Winchester*, 8 Allen, 109, is a leading authority, every line of which is applicable

to the case now in hearing. It was there held, that the inhabitants of the town were not liable for the payment of a note given by the treasurer for borrowed money, although he had been authorized by a valid vote of council to borrow such a sum. He had borrowed the sum from another, thus exhausting his power, but the plaintiff was ignorant of this act. The following paragraph is peculiarly appropriate here:

"The principal is not to be held bound by an act of the agent which exceeds the authority vested in him; if the authority is conditional or dependent on the existence of some fact. Whoever deals with the agent must see to it that the condition is fulfilled, or that the requisite fact exists on which the authority to bind the constituent depends. If, for example, a person empowers an agent to act for him while absent in a foreign country, and expressly provides that the authority is to cease on his return home, can it be doubted that in such case it is the duty of the person who undertakes to deal with the agent to ascertain whether the authority has terminated by the return of the principal, and that the latter would not be bound by anything done by the agent after the authority had ceased by the prescribed limitation? The liability of the principal certainly cannot be made to turn on the ease or difficulty with which the continuance or termination of the authority can be ascertained. Such a doctrine would create a new head in the law of agency. The true rule is the safe one for both parties. The principal can not be held responsible for an act of his agent beyond the limits of the authority delegated to him, unless it is done in the course of the agent's employment in the business of his principal, and during the continuance of the agency. If this is not the rule, a principal is at the mercy of his agent, and may be held bound for acts which he never authorized, however carefully he may have limited and guarded the power which he intrusted to him. On the other hand, whoever deals with an agent, must at his peril ascertain whether the agent has any authority in fact, and, if he has, whether the act or dealing is within its

scope. If this can be ascertained, there will be no risk incurred; if it cannot be ascertained, the sure protection will be to refrain from dealing with the agent at all."

In the course of the opinion, the Court declares its approval of *Mussey vs. Beecher*, 3 Cush., 511.

In *Franklin Bank vs. Commercial Bank*, 4 Am. Law Rec. (Cincinnati), 705, where it appeared that the president of the defendant bank had borrowed money from the plaintiff bank upon his individual account, and hypothecated a genuine certificate of his own shares as security, his signature to the blank transfer on the back of the certificate being attested by the cashier, the defendant bank was allowed to retain its lien upon the stock for indebtedness of the assignor to itself, a lien given by law. An attempt was made to apply the doctrine of estoppel, on the ground that the pledge of the shares by the president, aided by the cashier, misled the plaintiff. The claim was negatived. A single paragraph of JUDGE YAPLE'S able opinion, relating to the signature of the cashier, is pertiment here:

"But what authority had Colville, the cashier, or any other officer or agent of the bank, other than the board of directors, over the subject of the stock of any stockholder, or his dealings with it? He could not directly waive, for the bank, its lien upon Foote's stock for Foote's debt to the bank; and it might be difficult to understand how he could do it indirectly. All that he could say or do about Foote's stock, or any other stockholder's dealing with his stock, he would necessarily say or do, personally, on his own account, and upon his own personal responsibility, and not as the agent of the bank, for the bank never gave him any power to act for it in relation to any stock, or its transfer, owned by any of its stockholders.

"In this matter, he simply did what any other attesting witness does when he witnesses a signature to a writing or a blank to be overwritten, and that is all that the attestation purports. H. Colville, as an individual, witnessed the gen-

nineness of Foote's signature, so that Foote could, if he desired, negotiate the stock, as he had a right to do, in spite of the bank, which could only claim a lien upon it for Foote's indebtedness to it; and this was done before the transfer to the Franklin Bank, and not al all in view of such transfer."

In *The Floyd Acceptances*, 7 Wall., 676, the Supreme Court of the United States expressly declares that one who takes even negotiable paper, signed by an agent, must see to it at his peril that the signing was authorized. Said MILLER, J.:

"An individual may, instead of signing with his own hand, the notes and bills which he issues or accepts, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept in all cases as fully as the principal could; or, it may be a limited authority to draw or accept under given circumstances, defined in the instrument which confers the power. But, in each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must at his peril, see that the paper on which he relies comes within the power under which the agent acts. *And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued.* These principles are well established in regard to the transactions of individuals.

"Voluntary delivery, or (in case of paper redeemed and in the hands of the maker) voluntary re-issue, is necessary to the creation of an obligation upon a written instrument."

The case of *Platt vs. Birmingham Axle Co.*, 41 Conn., 264, is in point:

Mrs. Colt held stock in the defendant company. Her husband was its secretary. The certificate was hypothecated by the husband, with the wife's consent, to plaintiff, but the corporation had no notice. Subsequently the wife, with the

concurrence of the husband, borrowed money from the company, which became a lien upon the stock, by virtue of a by-law. The plaintiff claimed that Colt's knowledge of the first pledge affected the company, he being its secretary. The Court negatived the claim, saying:

"Colt borrowed the money from the petitioner for his individual use. As the husband of Lucie P. Colt, he knew of the delivery of the stock certificate to him and joined her in signing the paper referred to. This knowledge came to him in no manner and in no sense, as the secretary of the Birmingham Axle Company; his secretaryship in no degree operated to make him a party to the act or to bring him and the petitioner together. The corporation had no interest in the matter; it was not in legal identity with him, either as to the act or his knowledge respecting it; he was not an agent for it in the transaction which made him a witness to the delivery of the certificate; and he ceased to be its secretary and had left its service prior to the time when the loans were made which gave rise to the statute lien hereinafter mentioned."

And in *Winchestar vs. R. R. Co.*, 4 Md., 239, the Court says:

"It is undoubtedly true, as a proposition of law, that the principal is affected with the knowledge, and bound by the acts of the agent; but this principle can have no application to a case in which the one party does not act as agent, but avowedly for himself. * * * To hold a company responsible for all the acts of any of its officers, when they act confessedly in behalf of their own interests, and in an adversary character, would be to sanction the grossest frauds."

Wright's Appeal, 99 Pa. St. 425, is an authority upon this question. The president of a corporation represented to a stockholder that the company needed funds, and borrowed her stock. A new certificate was issued to her, upon which dividends were paid. Held, that as he was acting for himself, the loss must fall upon the stockholder.

United States vs. City Bank of Columbus, 21 How. 356, is a leading case.

The cashier of the bank wrote to the secretary of the treasury of the United States, that Wm. Miner, one of the directors of the bank, and bearer of the letter, was authorized to contract, *on behalf of the bank*, to transfer funds for the government, and to purchase government stocks. Miner made a contract which he failed to keep. The contract recited that it was made by him "as the agent of the City Bank of Columbus." No actual authority having been given by the bank, it was held that it was not liable. The following instruction to the jury is declared by the Court to have been comprehensive of the merits of the case, and precise in its application to the facts, and accurate in its expression of the law (page 363):

"If the jury find that the letter writen by Moodie was his own act, and had been given without the knowledge or authority of the board of directors, or any of them individually, except Miner, and that the agency of Miner was not constituted by or known to the board of directors, or the directors individually, or any of them except Miner, but was the act of the cashier alone; and if they should find that Moodie had no power as cashier, except such as belonged to the office of cashier generally, or such as are given by the charter, or by the by-law or other law or usage of the said bank, that the defendant was not concluded by that letter and is not bound by the contract made by Miner, without some subsequent ratification of the same, though the secretary had, in contracting with Miner, relied upon it as the act of the bank."

The Court cites, with approval, the preceding decision in *United States vs. Dunn*, 6 Pet., 51, where it was held that the president and cashier of a bank, uniting, could not relieve an indorser of a note held by the bank, from liability.

In *Duranty's case*, 26 Beav., 271, it was held that the directors of a company, while agents, were not agents for the purpose of committing a fraud. That the company is not affected by their false statements unless such statements *induce a contract with the company*. It is there said that where, by false representations of the directors of a company, a stranger is induced to take shares directly from the company, the transaction is not binding in equity, and he is not a contributory, but if, by such representations of the directors, he takes them from a third party, he is a contributory.

In considering this, LORD ROMILLY, M. R., says:

"I now come to consider what is the consequence of the false representations made by the company. The directors have made false representations, which have induced Mr. Duranty to buy these shares. I accede to the argument that the report of the directors is the report of the company. But the observation which I formerly made, that the agent of a company is not its agent for the purpose of committing a fraud, also applies, for this purpose—that the misrepresentations of the directors do not render the company liable in an action of deceit for making those false representations. This is an action of tort, and involves a moral culpability. The directors are agents of the company simply for the purpose of contract, and, in all matters relating to contracts, their acts bind the company; and if they make a false representation to A, and thereby induce him to enter into a contract with the company, the contract will be void, and the company will be bound by their representations; but not so with respect to contracts entered into between other persons, although founded on their representations; that if anything rests in action against the company, the directors are not the agents of the company to commit a fraud. The distinction between the two cases is obvious; the moment that, by issuing a report, which is the report of the company, the directors induce persons to enter into a contract with them, that contract may be set aside. But if they, by that report, or otherwise, induce other persons to enter into

contracts with third persons, that contract is not rendered void, and the company does not, thereby, become liable to an action for deceit, although the directors, themselves, severally and individually, who made that misrepresentation, do become liable to an action for deceit, in consequence of the report which they have so issued. That really is the distinction which prevails in these cases, and which is important to be borne in mind. The case of *Scott vs. Dixon*, [reported in 1 Ellis and Ellis, 2 Q. B., 1859; 102 E. C. and L. R., 1099] really proves this as plainly and distinctly as possible. It was an action brought, not against the company, but against directors, for issuing a false report, by reason of which the plaintiff had been induced to become a shareholder. He bought the shares *bona fide* from another shareholder, and in consequence he became subject to all the liabilities which attached to a shareholder, and accordingly, in the estimate of his damages, he claimed the amount of calls paid by him in his character of shareholder, and contributory, because, having become a shareholder from another person by a *bona fide* contract, he was, by reason of that contract, obliged to pay the calls. But Mr. Duranty's position is this: he has been induced, by false representations, to become a shareholder in the company, and he remains a shareholder. The shares are perfectly good shares, and are not annihilated by the fact that he bought them from a *bona fide* shareholder through false representations. He must, therefore, bear the consequences of being a shareholder, and must pay the calls. But assuming, which I do, *Scott vs. Dixon* to remain law, he has his action of deceit, or for damages, against the person who made those representations, upon the faith of which, and relying upon and believing them to be true, he entered into the contract which has made him a shareholder, and contributory and liable to pay the calls."

These two cases render the distinction between the liability of the company, and the liability of the directors, as clear as possible. It is illustrated in regard to contracts, entered into between the company and third parties by reason of misrepresentations made by the company's directors in *Henderson vs. Lacon*, L. R., 5 Equity Cases, page 261: In that case the plaintiff, Mr. Henderson, took

fifty shares in a company, on the misrepresentations contained in a prospectus issued by the authority of the directors. The Court held that the statement in the prospectus was a clear misrepresentation which overthrew the contract between the plaintiff and the company. SIR WILLIAM PAGE WOOD (afterward LORD CHANCELLOR HATHERLY,) in making his decision, said:

"I make these remarks, because I see a distinction upon which recent decisions have thrown a very clear light. I think the cases clearly show this—that any representations made by the agents of a company which form the foundation of a contract between that company and a third person—those representations lying at the root of the contract—will entitle the other party to avoid the contract, and the company must in that sense take upon themselves the consequences of the misrepresentations of their agents. The contract must be annulled. The position of the agents themselves, who make the misrepresentations, is different. As Mr. Giffard has observed—and I go with his argument as regards them—if you were to make them personally liable for the consequences of their misrepresentations, not they, but the party for whom they contracted, pocketing the proceeds—as in this instance, the company for whom the directors may be taken to be acting as agents you must fix them also with a guilty knowledge of the misrepresentation which is communicated to the person who is to be led into the contract, etc."

All the principles of this decision are fully asserted in *Western Bank vs. Addie*. L. R., 1 Scotch App., 146.

See also *Wharton's Agency*, Secs. 171 and 478, and authorities cited.

Not only upon the question of agency, but upon every other question in this cause, the case of *Mechanics' Bank vs. N. Y. & N. H. R. R. Co.*, is precisely in point. 13th N. Y., 599.

The R. R. Co., which was a Connecticut corporation, had

opened a transfer office in New York City, and appointed Robert Schuyler, who was, also, president of the company, its transfer agent. Schuyler issued a fictitious certificate to one Kyle, who pledged it to the plaintiff bank. The action was by the bank against the company. The Court held that there could be no recovery, as the act of Schuyler was not within the scope of his agency, and the certificate was a non-negotiable instrument. At page 612, JUDGE COMSTOCK says:

"Schuyler, as the agent of the company, had no power to issue a certificate for shares of stock, except upon the conditions precedent of a transfer on the books by some previous owner, and the surrender of that owner's certificate. He was the transfer agent merely, and his powers were expressly limited to that department of the business of the corporation. He had no general certifying power, nor any power at all to certify, except as incidental to a transfer of stock by its owner to some one else, and as an incidental power it could only be exercised upon the conditions named."

I forbear to make further extract from this opinion in this connection, but the whole subject is discussed with the remarkable vigor, clearness, and accuracy, for which its author is so justly distinguished.

The non-negotiable character of the certificate is clearly set forth, and the claim of an innocent purchaser denied. The want of privity between plaintiff and defendant is shown, and the plain reasons for refusing to apply the doctrine of estoppel are stated.

This case is cited in *Lowell vs. Winchester*, 8 Allen, 109, and precisely the same principle asserted, as above shown. It is also cited by this Court in *R. R. vs. Howard*, 7 Wall., 392. Its principles are distinctly asserted in *The Floyd Acceptances* case. 7 Wall., 666.

The case of *Pollard vs. Vinton*, 105 U. S., 7, is conclusive of the case in argument. There the agency of Cobb & Co., to bind the defendants by bills of lading, issued in the regular course of business, was complete. They issued the bills sued on in the usual form, which were purchased in good faith by plaintiff. This Court held that the purchaser must assume the peril of the fact that the goods described in the certificate had in fact been delivered to the agents. The principle is the same that was asserted in *The Mechanics' Bank Case.*

A bill of lading is identical, in all its legal characteristics, with a stock certificate. Both are freely assignable. Neither is negotiable. Both are evidences of title to property. Both contain recitals of matter of fact. Both are used as pledges for money. In point of fact, millions are advanced upon the faith of bills of lading where thousands are advanced upon the faith of stock certificates. All the reasoning which this Court applied in the case of *Pollard vs. Vinton*, and in the previous decision in *The Schooner Freeman* case, in 18 How., applies as well to the case of a false and fictitious stock certificate. The decisions in those two cases are in harmony with the settled law of England as declared in *Grant vs. Norway*, and other cases, and with the decisions of the Supreme Courts of Massachusetts, (3 Allen); Ohio (22 O. S., 118; 25 O. S., 367); Maryland, (44 Md., 11), and other decisions, to which it is not necessary to refer.

The precise question involved here has been the subject of prolonged and laborious examination in the Superior Court of Cincinnati, in a trial presided over by JUDGE FORCE. The President of the Cincinnati Southern Railway Co. had signed some certificates in blank. The secretary

had wrongfully filled one of them in his own favor, and hypothecated it for a loan.

Upon a motion for judgment made by the defendant, at the close of the plaintiff's testimony, JUDGE FORCE delivered an opinion, from which I make an extract. I do not present it as authority, but it is presented as a clear statement of the principle for which the defendant contends in this case, and now under immediate consideration, a statement made after much consideration by a very able and learned jurist. The extract is as follows:

"Now, the question whether or not this is a representation by the corporation brings up as the next question, one which has been largely discussed by counsel: How is it that a corporation becomes liable. The whole body of a corporation seldom acts; the body of shareholders seldom act directly, except in the election of officers. The corporation must act through agents or through agencies; and as is said by one of the ablest of the Justices of the Supreme Court of the United States, while it is true that in some cases the person who acts for a corporation is a mere agent, yet in some cases the person or body who acts for a corporation really, is *pro tanto* the actual corporation itself in law. For such purposes some officers or bodies may be the organs of the corporation, as the voice, the hand of a person in action may be taken to be the person himself. Though it is true, that an agent when acting binds the corporation, or that an officer or board is for the time being the corporation itself, that is so, only when the agent, officer, or board or other authority is acting in the business of the corporation is carrying on the affairs of the corporation. Of course, a man who is an officer or director, while transacting his own business, is not the corporation.

"Then, having arrived at the point that this certificate may contain a representation made by the corporation, and that such representation, being the representation of the corporation, may have been made by some board or perhaps by some officer or agent, the question is, how does the case stand upon the evidence now submitted in this case. In ap-

proaching that we have to consider the question, when does a certificate of stock which is invalid, being issued by fraud, or being an over-issue, when does such a certificate of stock bind a corporation, make it responsible, either to receive it as stock or responsible for it in damages.

"An over-issue made directly by a corporation, may be made either guiltily, or innocently, that is, in good faith, by accident and mistake. If the Board of Directors should wilfully resolve to issue stock in excess of the amount allowed by charter, and it should be so done, that undoubtedly would be the act of the corporation. If certificates, irregular, unlawful or spurious, were fraudulently issued by an officer of a corporation, if the corporation should afterwards ratify that act, it would be liable; and it has been held that it is so ratified when the corporation, either actually knowing, or acting under such circumstances that it ought to know, and is held to be bound to know, the mode of issue, should receive the profits arising from such issue and put it upon the book of the corporation as representing genuine stock. That I take to be the ruling in the Schuyler case, in 34 New York. And there may be an over-issue of certificates without being an actual over-issue of stock; that is, where several certificates are issued, intending to represent the same stock, as in the case of the Bahia and SanF rancisco Railway Co., where the question was as to who was the real owner of particular stock; or as in the case in the 35 O. S., where there were two actual outstanding certificates in the hands of different holders, and the question was, who was the proper owner of the stock represented by these two separate certificates. In such cases it is held, the corporation may be liable, although acting in good faith.

"There may be over-issues which do not bind the corporation; that is, stock may get into circulation in such a way that it does not bind the corporation. Suppose a certificate is made out complete, executed and filled, but not delivered by the corporation; if that should be stolen by a stranger or a stockholder, or an officer, excepting for the present officers whose duty it is to sign certificates, and put upon the market fraudulently, that would not be an issue by the corporation certainly, and would not bind the corporation. Or if an incomplete certificate should be so purloined by such persons as I have named, and after being purloined should be filled out and completed, that would not be an issue of stock by

the corporation, it would be an act of forgery by the person who so filled it up, and would not bind the company.

"Now suppose that such an act were done by, say the secretary of a company; such an act is supposable, as it appears by the books that such a thing has been done. Suppose the secretary, whose business it is to sign the stock, should improperly make out and fill, without being authorized to do so, and without paying therefor, a certificate to himself, and having so filled it should pledge it to secure a debt of his own; pledging the paper to secure a debt of his own would not be an act of the corporation. The act of the corporation must be found in the issuing of the stock to the secretary himself. What are the acts which constitute such placing of a certificate in the hands of the secretary? It would be the secretary taking a blank which is the property of the corporation, and either appropriating that blank and afterwards completing it, or completing it as secretary, and afterwards appropriating it himself without right. In that transaction there are two parties, the corporation and the secretary. The transaction is the secretary's improperly appropriating to himself the property of the corporation. Now, where there are two persons, and one is purloining the property of the other, can it be said that he is carrying on the business of that other? It seems to have been held so at least in two cases; I think that is the holding in the 39 Maryland, in the Tome case, and appears to me to be the holding in the 61 New York in the Titus case. The contrary is held in the 13 New York, case of Kyle, and in Wright's Appeals in 99 Penn. The 34 New York, the Schuyler case, I think does not cover this case; it covers the case where the corporation was held by the Court to have ratified the acts of the agent by receiving the benefit of his acts under circumstances when it was bound to know the character of his acts, by omitting for five or six years to read the record which he made of his acts legibly, and also from the fact that certificates having been surrendered, were so blended with genuine stock in new certificates that it was impossible for the corporation to say of any particular certificate, this certificate is invalid. The cases being divided, I am at least inclined to say for the present, that where the secretary in that way fraudulently attempts to create in his own favor a baseless claim against the corporation, his act does not appear to me to be an act done by him in the course of his

business as an employee of that corporation. If he appropriates a blank certificate and after appropriating it, fills and signs it, that appropriation may not be under our statute an embezzlement; or where he as secretary fills before appropriating, that may not be under our statute a forgery. But if he does, in so first filling and completing the certificate, act as secretary, so as to make a complete certificate, then his appropriating it to himself after completion would be under our statute embezzlement. Or, if it should be held that he appropriated the blank unexecuted paper, and after he had taken it away from the corporation and appropriated it to his own use, and he should then undertake to fill it up, and sign it and pass it off as genuine, my impression is that would be an act of forgery under our law. So that as at present advised it seems to me that such a paper would scarcely get into circulation under such circumstances without the commission of a technical crime as well as a willful wrong by the party. Nor would that be affected by the mere fact that the certificate has already had the valid signature of the president annexed to it and left in the hands of the secretary for the purpose of lawful use. It perhaps has been held otherwise in New York and Maryland; but the great bulk of authority it seems to me is explicit, that where there is an act of negligence by one, which act of negligence cannot injure another, unless there is interposed a crime committed by a third party, that negligence is not held to be the approximate cause of the injury, and the party is not answerable. And it has been held in the United States Circuit Court of this district, in an action much like the present, that it is immaterial whether or not it is negligence for a president of a company to leave his name to a certificate to be completed subsequently by the secretary when occasion arises."

The concluding paragraph refers to the decision of JUDGE BAXTER in this cause.

And, in subsequently charging the jury, the Court said:

"The remaining claim is that if the certificate was not valid—that is, valid in the manner above described.—but was an over-issue, then it was an over-issue by the fraud or

negligence of the defendant. As no fraud or negligence is alleged other than the making and issuing of a certificate which, in fact, represented no stock, this claim is that the making and issue were the acts of the corporation.

"It is plain from the evidence that if the certificate was such over-issue, it was fraudulently filled, signed and sealed by Doughty and appropriated by him to his own use, and was, of course, of no validity against the corporation so long as it remained in Doughty's hands. Being a non-negotiable instrument, the question arises, if it was not valid in Doughty's hands against the corporation, how could it be valid in the hands of any one who derived the title from him? In the case of a negotiable instrument, a promissory note for example, the rule is that a *bona fide* holder can recover on it against the maker notwithstanding the maker had a good defense against the payee. And yet, even in the case of such negotiable instrument, there are cases where a *bona fide* holder can not recover, as when a person is by fraudulent device entrapped into signing a note while he supposes he is signing a wholly different paper; or when he makes and signs a note payable to bearer, but does not deliver it and it is stolen and put into circulation; or makes and signs a note payable to order, but does not deliver it and the payee steals it and endorses it. In all such cases, though the note bears a genuine signature, and in the last bears also the genuine indorsement of the payee, the law holds that it is not the note of the apparent maker, and he is not liable upon it. The rule as to non-negotiable instruments, on the other hand, is that whoever takes them takes them subject to any defense which the maker had against the original promissee, and, of course, in such cases, as those named, as well as in many other cases, the maker is not liable to one who has bought them in the course of business for value, and without notice of any defect.

"A certificate of stock is a non-negotiable instrument. But it has this peculiarity—it contains a statement that the person to whom the certificate issued is owner of the specified number of shares of stock in the corporation. The law holds that this statement is a representation made directly to every person who proposes to take the certificate in purchase or pledge. And hence, if the certificate is made by the corporation, every person who takes it in good faith has a right of action against the corporation, if it turns out that

the representation is untrue. The defendant, therefore, in this case is liable, if it made Certificate 299, although the certificate in fact represents no stock, and was of no validity so long as it remained in Doughty's hands. Hence, the plaintiff has made the claim that the certificate was in fact made by the corporation, even if it is an over-issue.

"If Doughty, in the making and issue of the certificate, was acting within the scope of his employment as Secretary of the corporation, his act was the act of the corporation; otherwise it was not. When he pledged the certificate to the Troy Bank to secure his debt to it, he was of course acting in his personal business, not in the business of the corporation. The issue of the certificate, if it was issued by the corporation, was the issue by the corporation to him. The act of Doughty was one of two things. He either (1) filled, signed and sealed the certificate, fraudulently creating an apparent claim for $25,000 of stock in his own favor against the corporation, and then taking it and appropriating it to his own use. And such despoiling of the corporation by him was not an issue by the corporation to him; rifling the books of the corporation was not an act within the scope of his employment. Or (2) he took and appropriated the blank to his own use, and after that filled, signed and sealed it. But after he had appropriated the blank to his own use, he had no authority to affix to it the seal of the corporation, or his own signature as Secretary; such acts, under such circumstances, were not within the scope of his employment, and the certificate was neither made nor issued by the corporation.

"It further appears in the case that the president of the company signed the certificate in blank to facilitate the transfer by the secretary of stock upon surrendered certificates, and that the secretary was at the time of good reputation, and the president has testified that he knew no ground for suspecting him of dishonesty or malpractice. The president and secretary were separate, independent officers of the corporation. Neither derived his authority from the other. Each derived his authority from the corporation and from the law. The signing of the certificate in blank conferred no new authority upon the secretary. I do not say the signing of the certificate in blank was not negligent conduct. But, whether it was or not, it was not this act of the president but the criminal fraud of

the secretary that launched the certificate, and that act of the president does not change the question of liability.

"I say the signing of the certificate in blank by the president is not a fact which by itself imposes liability upon the corporation. It is easy to imagine a course of conduct which would make the corporation liable. If certificates were previously signed in blank and the books of the corporation showed so that the president or directors knew or reasonably ought to have known previously to the issue of 299, that blanks so signed were used in making fraudulent certificates; or if the president or directors knew otherwise that they were so used, then the omission to prevent the issue of this would be in law an assent to its issue, and the corporation would be liable. If the evidence shows such to be the fact in this case, you will find accordingly."

Upon the argument of the case above referred to, my learned friend, MR KITTREDGE, who represented the plaintiff there, as he does here, declined to discuss the law of agency, assuming that it was not involved in the case, and relied upon the concluding paragraphs of the opinion of this Court in *Pollard vs. Vinton*, to-wit:

"The case of *New York and New Haven R. R. vs. Schuyler*, 34 N. Y., 30, is much relied on by counsel as opposed to this principle.

"Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far Courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of pure agency, and depends solely on the power confided to the agent.

"In the other case *the officer is the corporation* for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud except as this intelligence, this purpose, this fraud is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are

agents, and are to be treated as the agents of the corporation or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts."

To infer from this languge that this Court meant to intimate an opinion that a corporation will be bound by the acts of its agent upon a rule other than that which affects private individuals, is to fall into error. The view of that subject which is entertained by this Court has been distinctly announced on repeated occasions.

Merchants Bank vs. State Bank, 10 Wall., 645.
Fleckner vs. Bank, 8 Wh., 338.
Minor vs. U. S., 1 Pet., 46.
Bank of U. S. vs. Dunn, 6 Pet., 51.
U. S. vs. Bank of Columbus, 21 How., 356.

It is not difficult to understand this language when read with reference to the case of Schuyler, to which it refers. The opinion in that case relates to transactions of an officer who was practically the corporation. He was president, financial manager, and transfer agent. He sold new stock, selling genuine and spurious shares, indiscriminately, over the defendant's counter, using the proceeds of both, genuine and spurious shares for the benefit of the company and his own benefit, indiscriminately. This course of business went on for years. It was known to all the clerks in the company's office. It all appeared upon the books, so that any director who had chosen to open them, could not fail to see the truth. This was a complete abdication by the board of directors in favor of Schuyler. The Court held that the acts of Schuyler were *within the scope of his agency*. How could it have held otherwise?

Strange to say, this case has been understood as overruling the *Mechanics' Bank case*. So far from this being true, the truth is that the *Mechanics' Bank case* is distinctly affirmed by it. At page 73, JUDGE DAVIS, says:

"In this view I see no ground upon which the plaintiffs can, in this case, be permitted to deny that Schuyler was acting within the scope of his authority in issuing the false certificates; and they are, therefore, to be treated as though issued by the board of directors. Considering them of that character, the question of estoppel, as it arises upon their face, that is, whether the corporation is estopped from saying that they were not genuine representatives or monuments of title to stock, was rightly disposed of by the opinion of COMSTOCK, J., in the *Mechanics' Bank case*."

And on page 61 it is said:

"But conceding that the whole question of this case is governed by the law of principal and agent, it becomes of grave significance to ascertain the scope and extent of the powers conferred on the agent. Herein, I think, the case essentially differs from that of the *Mechanics' Bank* (3 Kern., 599). The question in that case is stated by COMSTOCK, J., in 16 N. Y., at pages 154, 155, with succinctness and accuracy. He says:

"*In that case, the transfer agent of the defendant's corporation was authorized to sign and issue certificates of stock on a transfer from one shareholder to another upon the books and on the surrender of the previous certificates.* The agent, for his own purposes, signed and issued certificates to a large amount, where there had been no such transfer or surrender. These unauthorized and spurious instruments were in form precisely like those that were genuine and authorized. Trusting to their false appearance, the plaintiffs took one of them by transfer, and advanced money upon it, which they recovered in the New York Superior Court. We held they could not recover, and reversed the judgment, placing our decision prominently upon the ground *that the acts of the agent were not within the real or apparent* scope of the power delegated to him."

"It *now appears* that the agent, in addition to the power thus stated, had authority also *to issue certificates in pre-*

cisely the same form to the original subscribers for the stock, and, to some extent, did do so; that he had authority to dispose of the stock of the company, not taken by the original subscribers (of which there was a large amount), and issue certificates in the same form to the purchasers; that he had authority to dispose of certain forfeited shares, and in such case issue like certificates; that he had authority to receive transfers to himself of stocks on behalf of the company, and transfer the same to purchasers, and issue like certificates to them; that, before the increase of the capital to 30,000 shares, he did issue to his own firm a large number of false certificates, which became the basis of transfers on the books to third parties, and by some arrangement were absorbed with the enlarged capital as genuine stock; that he acted, to some extent, as financial agent of the company, and through his firm raised large amounts, "indiscriminately on genuine and spurious certificates of stock," which were paid out on the check of the firm on behalf of the company, and on its construction account; that to him was intrusted the keeping of all the stock accounts of the company and its dealers at the New York office, and in those accounts he entered all his transactions; both false and genuine; that the books were kept closed to dealers; that his management of the affairs of the office, and of all these various matters, was never investigated or questioned."

The cases are further distinguished at page 62, and again on page 53, where this significant language is used:

"The next important general inquiry is into the manner in which the plaintiffs discharged those duties at the New York agency, with a view to determine whether their conduct has been of such a character that the law, in behalf of innocent parties, and to prevent injustice, will imply authority in the agent to do the acts that have occasioned the injury on the principle of *estoppel in pais. This inquiry was not involved in the case of the Mechanics' Bank against these plaintiffs.* (3 Ker., 599) *for the facts, upon which it arises were not then before the Court, and the questions discussed did not embrace them. The only question of estoppel considered in that case was the one arising on the face of the certificate itself.*" etc.

Hence, it is clear that there is no conflict of opinion, as to the question involved here, between these decisions. Two of the Judges who sat with COMSTOCK in deciding the first case (WRIGHT and DENIO), sat with DAVIS, and concurred in the second. The *Mechanics' Bank case* is thus referred to in *Griswold vs. Haven*, 25 N. Y., at page 588:

"In this case the plaintiff sought to recover for a fraud committed by Robert Schuyler, who was agent of the railroad company, for transferring its stock. The alleged fraud consisted in issuing to one Kyle a spurious certificate for eighty-five shares of the capital stock of the company and thus falsely representing that Kyle was the owner of such stock, when in truth he owned no stock, and was not entitled to the certificate. Kyle had borrowed money of the plaintiff, and assigned the certificate as security. *It was a sufficient answer to the action, that Kyle, to whom the certificate was issued, being privy to the fraud, had, of course, no claim against the company, and that his assignees could have no greater rights than himself.*"

Although this case criticises some of the views expressed in *The Mechanics' Bank case*, it is an explicit approval of the judgment in the case upon a ground which governs the present case.

The *Mechanics' Bank case* is again referred to, with a distinct concurrence in its result, in *Farmers' Bank vs. Butchers' Bank*, 16 N. Y., at page 140. It is quoted as authority in *Wilcox vs. Howell*, 44 N. Y., 398, and in 78 N. Y., 179; 80 N. Y., 534, and 84 N. Y., 172.

There is a single point upon which the opinions of JUDGES COMSTOCK and DAVIS are at seeming variance, a point not involved in the *Mechanics' Bank case*, as JUDGE DAVIS points out, and not involved in this case, to-wit:

JUDGE COMSTOCK assumed that the case of *North River Bank vs. Aymar*, 3 Hill, 262, had been overruled. JUDGE

DAVIS thought otherwise. The point decided in that case was that where an agent had power to issue negotiable notes in his principal's name, and in his business, one who took a note made by him was not bound to inquire whetner it was in fact made in the principal's business. JUSTICE NELSON dissented. The case was reversed and is not reported in the Court of Errors. It makes no difference whether it was reversed on this ground or not. It is directly in the face of the opinion of this Court in *The Floyd Acceptances*. Manifestly, the discussion which took place between JUDGES COMSTOCK and DAVIS was uncalled for. Neither case required it. At all events, we have seen that the decision in 34 N. Y. did not overrule, but approved of the decision in 13 N. Y., and that the two cases are entirely consistent in every essential particular.

The next case decided in New York is *Bruff vs. Mali*, 36 N. Y., 200. This was an action directly against the officers who had perpetrated the fraud. They had issued millions of fraudulent stock, and sold it over the counter. They were held liable. No question of agency arose. None was considered.

Then came *Titus vs. Turnpike Co.*, 61 N. Y., 237. In this case the president had signed in blank, and the secretary filled up the certificates in his own favor and pledged them for his own debt. The Court held the company liable. The question was not discussed or considered. The learned counsel for the corporation generously conceded that if the certificates were in the same form, which would have been properly issued to the secretary for genuine shares, if he had been the owner of such, the defendant would be liable. The Court accepted the concession, and assumed that the point

had been settled in *Schuyler's case* in 34 N. Y., and *Bruff vs. Mali*. The whole subject is disposed of in a single paragraph, upon page 245, as follows:

"It is not questioned by the defendant that it is liable to the plaintiff for the acts of its officers in issuing the certificates for spurious stock, is established in the present case, if they were authorized to issue certificates for valid stock held by themselves. Its liability for such acts is settled by the decisions of the Court of Appeals in the cases of the *N. Y. & N. H. R. R. Co. vs. Schuyler*, 34 N. Y., 30, and *Bruff vs. Mali*, 36 Id., 200, and the General Term, on the authority of those decisions, holding the defendant liable, properly reversed the judgment entered on the report of the referee."

The unhappy and unjustifiable concession of the defendant's counsel led the Court into a mistake. We have shown that none of these questions arose in *Bruff vs. Mali*, which was not an action against the corporation at all, and that the *Schuyler case* announced no such doctrine, but distinctly approved of the *Mechanics' Bank case*, which is directly opposed to this decision. The Court takes no notice of the last named case. The exact value of the *Titus case* is thus easily determined.

Thus matters stand in New York, except that it ought to be observed that in *Armour vs. R. R. Co.*, 65 N. Y., the Court of Appeals decides that a fraudulent bill of lading imposes liability upon the carrier, a decision which is directly opposed to the views of this Court. The decision indicates that the pressure upon the Courts of New York of the mighty commercial interests of that great State is being felt, and is gradually working changes in the law, which should only be made by the Legislature.

A careful study of the New York decisions will show that the *Titus case* stands alone. In no other decision in

that State upon the subject of stock certificates is there any suggestion that an innocent purchaser can obtain a better title than his vendor.

In *Mechanics' Bank case*, Schuyler issued a fictitious certificate to Kyle, who pledged it to the bank. The bank took it in good faith. It was held that there could be no recovery. The principal ground of the decision was that the certificate was non-negotiable, and that Kyle could confer upon the bank no better title than that which he held.

In *Schuyler vs. R. R. Co.*, this principle is fully recognized.

In *M'Neil vs. Tenth National Bank*, 46 N. Y., 329, it is said:

"It must be conceded that, as a general rule, applicable to property other than negotiable instruments, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another, where no other element intervenes."

In *Moore vs. Metropolitan Bank*, 55 N. Y., 41, it is said (p. 46):

"Yet it is beyond question that the general rule is that *a purchaser of corporate shares*, or of goods and chattels, acquires only such title as the vendor had."

After negativing the claim of counsel that there was a distinction between certificates of stock and other choses in action, as to the application of the doctrine of estoppel, the Court says (p. 48):

"The counsel further insists that to apply the same rule to non-negotiable choses in action will, in effect, make them negotiable. Not at all. No one pretends but that the purchaser will take the former, subject to all defenses, *valid as*

to the original parties, nor that the mere possession is any more evidence of title in the possessor, than is that of a horse. In both respects, the difference between these and negotiable instruments is vital, and not at all affected by the application of the same rule as to chattels."

This case is cited, commented upon and followed, in *Combes vs. Chandler*, 33 Ohio St., 178, where it is held, that one who is cheated out of non-negotiable notes can not reclaim them from an innocent purchaser. The concluding paragraph of the opinion deciares that this is but the application of the familiar rule as to chattels, based upon the distinction between things void and things voidable.

In *Griswold vs. Haven*, 25 N. Y., at page 598, the Court, commenting upon the case of *The Mechanics' Bank*, says:

"Kyle had borrowed money of the plaintiff, and assigned the certificate as security. *It was a sufficient answer to the action, that Kyle, to whom the certificate was issued, being privy to the fraud, had, of course, no claim against the company, and that his assignees could have no greater rights than himself.*"

In *Second National Bank vs. Walbridge*, 19 Ohio St., 419, the New York case last cited is commented upon. Judge White says:

"In *Griswold vs. Haven*, the estoppel was held to arise on the false representation of Wright one of the defendants, that the grain mentioned in the receipts was in store and in good order. The representation was made directly to, and was relied upon by, the plaintiff, in making out the advances."

And again he quotes from the language of the case itself:

"I have no hesitation, therefore, in holding that, under the circumstances of this case, the detendants were bound by the representations of Wright. *I mean the verbal representations, not the representations contained in the receipt.*"

Notwithstanding the premises, it has been generally assumed that the case of *The Mechanics' Bank* was overruled by the Schuyler case. The Court of Appeals of Maryland has assumed this to be the fact in a case to which I will now refer:

Tome vs. Parkersburg R. R. Co., 39 Md., 36.

In this case Crawford was treasurer and transfer agent of defendant. He issued shares in favor of plaintiff, delivered them to one Rich, a broker, who borrowed money from plaintiff upon them. The money was borrowed for Crawford, but this was unknown to plaintiff. There was no limit to the amount of stock which Crawford could issue, say the Court, but this is probably a mistake. The Court held explicitly that this was done "in the course of Crawford's agency," and within its scope.

This holding is made largely upon the authority of the case of *Schuyler*, and upon the assumption that it overruled the *Mechanics' Bank Case*. It also cites *Robson vs. Shropshire Co.*, L. R., 8 Q. B., 420, since overruled. (7 H. L., E. & I. Appeals, 496.) The citation by the R. R. Co., of the case of *Swan vs. Australasian Co.*, is felicitously disposed of by the suggestion that that decision does not conflict with the decision in the Schuyler case, "but differs rather as to the degree of negligence which constitutes *estoppel in pais*." The entire decision assumes the only question which was really open for debate, to-wit: whether an agent borrowing money for himself, and pledging his principal's chattels, is acting within the scope of his agency. This having been assumed, it was hardly necessary to expend time and labor in marshaling authority to establish defendant's liability. A majority of the judges were of opinion that the company

would have been liable, even if the president's signature had been forged! It was claimed by defendant that it was forged. And we are not surprised to find that the same Court, shortly afterward, held that a railroad company was not liable for a fictitious bill of lading, fraudulently issued by its agent (*B. & O. Co. vs. Wilkens*, 44 Md., 11), and attempted to establish and define a difference between bills of lading and certificates of stock, as to their legal characteristics. The stock certificate, says the Court, is a certificate of title to property, made to the stock-dealing public, while the bill of lading is only an agreement to carry. Every other decision in England and America, upon the subject of a bill of lading, treats it as evidence of ownership, and absolves the carrier from liability for fraudulent bills, only on the ground that they were issued by agents who exceeded their authority.

"A bill of lading," says the Supreme Court of the United States, in *Pollard vs. Vinton*, "is an instrument well known in commercial transactions. In the hands of the owner it is evidence of *ownership*, special or general, of the property mentioned in it."

The point is explicitly decided in numerous cases cited with approval in the opinion in *Walbridge vs. Bank*, 19 Ohio St., 419.

The point was decided two hundred years ago (2 Vernon, 203). It was held in the great case of *Lickbarrow vs. Mason*, one hundred years ago. But, to clear up all doubt upon this subject, and make it impossible for the plaintiff's counsel in this case to break the force of the uniform course of decision upon fraudulent bills of lading, it need only be said that, by statute, in England, the holder of a bill of lading is deemed the owner of the goods named in the bill, and

yet, notwithstanding this provision, *Grant vs. Norway* and kindred decisions have been made. (See reference to this statute in notes to *Lickbarrow vs. Mason*, vol. 1, part 2, Smith's L. C., * p. 886.)

The Court of Appeals of Maryland, evidently overlooked these statutory provisions.

Nearly all the States, recognizing the *quasi* negotiability of bills of lading and warehouse receipts, have enacted laws to prohibit fraudulent issues. This is to give security to those who invest their money upon the faith of such instruments. "Faith" in what? According to the Court of Appeals of Maryland, faith in the willingness and ability of the carrier to comply with his contract for transportation! But that is not the thing which is contemplated by this legislation. It is "faith" in the ownership of the property by the person named in the bill of lading.

JUDGE BOWIE, in deciding *Tome's case*, relies upon *Bahia R'y case*, which belongs to a wholly different class of cases. That case proceeded upon the assumption that a corporation, in accepting a surrender, and issuing a new certificate, was bound as the bank is bound which pays a forged check. Reliance is also placed upon the *Titus case*, with the announcement that previous decisions in conflict with it were "of course overruled."

He further cites, as pertinent, *Atlantic Bank vs. Merchants' Bank*, 10 Gray, 532, and *Merchants' Bank vs. State Bank*, 10 Wall., 604, cases which have no bearing whatever.

This is the only decided case which seems to support the plaintiff's case. It differs from the plaintiff's case in two important particulars: 1st, plaintiff, Tome, did not

know that he was lending money to the agent; 2nd, there was no limit, the Court says, to the amount of stock which Crawford could issue. It was not a case of over-issue.

When we say that this case stands alone, we are not unmindful of *Titus vs. Turnpike Co.*, 61 N. Y., 237. That decision was based upon the concession of defendant's counsel, and the consequent assumption, by the Court, that it was controlled by the *Schuyler case*. Hence, the question was not examined or considered. That the Schuyler case has no bearing whatever upon it, except to show, incidentally, that the concession of defendant's counsel was owing to the fact that he had omitted to read that interesting decision, is quite apparent. But the two cases stand upon entirely different grounds. The Tome case rests upon the assumption that the acts of forgery and theft, of which Crawford was guilty, were strictly within the scope of his agency, and that, therefore, upon the most elementary principles of the law of agency, the company was bound. The Titus case proceeds upon the ground that an innocent purchaser of a non-negotiable instrument stands upon the same footing that would be given to the purchaser of a negotiable instrument.

JUDGE BOWIE quotes liberally from the case of *The Schuylkill Bank vs. Kentucky Bank*, 1 Pars. Sel. Cases, 180. The citation has no pertinency whatever, as examination will prove.

Bank of Kentucky vs. The Schuylkill Bank.

This was a bill in equity, filed under the authority of a special act of the Legislature of Pennsylvania. The Schuylkill Bank had become the agent of the Kentucky

Bank, for the purpose of discharging the duties of a transfer agency in Philadelphia. It made false transfers upon the transfer books, and issued false and fraudulent certificates. These certificates were surrendered to another transfer agency in New York, and some of them at the parent office in Kentucky, and other certificates issued to the persons who held them. The persons to whom these new certificates were issued from the New York and Louisville offices, were all innocent purchasers. Nor is there any suggestion, in the report of the case, that any of the persons who surrendered, in New York and in Kentucky, certificates which had been issued in Philadelphia, were aware of the fraudulent conduct of the Schuylkill bank, or in complicity with Levis, the cashier of the Schuylkill bank, who was the chief, if not the sole, actor in the commission of these frauds.

It was impossible, when the subject came to be examined, to determine what stock certificates of the Kentucky Bank represented genuine shares, and what certificates were fictitious. The spurious could not be separated from the genuine.

In this condition of affairs, the bank re-organized, adjusted the claims of all holders of certificates, and sued the Schuylkill Bank for damages for its misconduct.

Much of the report relates to the question whether the Schuylkill Bank, or Levis, was the agent, and whether the Schuylkill Bank had corporate power to accept such agency.

The bill states that the over-issues were made

"For the use and benefit of the Schuylkill Bank, and the greater part of it sold, and the proceeds thereof used and appropriated to their own purposes."

These facts appear at pages 186 and 187.

It was contended by the defendant that there could be no recovery against it, because the plaintiff had not been under any legal obligation to retire the illegal issues. This point was considered, and the Court says (p. 245):

"If the holder of the spurious stock had any remedy against the complainants for the wrongs they suffered through the instrumentality of their transfer agent, that would suffice for the purposes of this case. This, however, is also denied by the defendants, who insist that the holders of the spurious stock had no such remedy against the corporation of the Bank of Kentucky, and this, because the purchasers of this stock, knowing *the transfers to them were made by an agent, were bound to look to the authority of such agent*, and because, by the terms of the charter, a certain act was to be done before issuing new certificates, viz: the surrender of the old ones, which the transferees were bound to see complied with by the transferors, before accepting new certificates."

The Court proceeds to negative this claim (p. 247), saying:

"The obligation to surrender the old certificate, is not a limitation on the power of permitting transfers, so far as respects the bank. It is a provision introduced for the security of the bank, in order to prevent its being embarrassed between legal and equitable titles to its stock, and in order to secure to the bank, any liens or claims on its stock. * * * How, then, can it be pretended that a purchaser of bank stock has any obligation imposed on him to see to the surrender of the old certificate, and its due assignment, when that is a matter for the interest, and consequent supervision, of the bank itself.

"Who conducts the preliminaries resulting in the issue of the new certificate? Why, the bank itself. The idea that the purchaser of stock is to lose the property he has honestly paid for, because the bank has not done its duty to itself, is unreasonable to the last degree."

Understood with reference to the facts of the case which

the learned judge was deciding, there can be no doubt of the correctness of these views. The Court was speaking of certificates issued by the corporation directly to the holders or their transferees. If it was impossible to separate the genuine from the false, all were entitled to be treated as holders of genuine certificates, because the burden of proof would be upon the company, upon an issue as to the validity of any of its own certificates. Besides, the issue of new certificates upon the surrender of spurious ones, bound the company, upon the principle that one who pays upon even a forged signature is estopped.

Hart's case. L. R., 5 Ex., 111.

This is the precise principle upon which *Davis vs. Bank of England*, 2 Bingham, 393, was decided, and this principle, and this authority, are relied upon to sustain the judgment of the Court. *The liability of the Bank of Kentucky to the persons to whom Levis issued spurious stock originally, is distinctly placed upon the sole ground that it had retired such certificates, and issued new ones, thus placing itself in privity with them.* The report of the case shows that the language above quoted relates to shares which were either genuine, or assumed to be genuine, while certificates such as that issued by Moores in this case, can only be made obligatory upon the corporation by the surrender of such certificate, and, the issue of a new one! To remove all doubt upon this vital point, I quote from page 249:

"The greatness of this claim, and the admitted inability of the Schuylkill Bank to respond to it in full, render unnecessary much examination into another question discussed, viz: whether the complainant has any, and what claim, as representing the holders of the spurious stock. While in this branch of the argument, it seemed conceded

that the parties to whom the transfer agent immediately issued spurious stock might have a remedy against such agent, it was denied that the assignees of such original holders had any such direct remedy against the agent and over against the principal. It was said that no privity existed between these assignees and either the agent or principal. That there was no such thing as the assignment of a warranty; no such thing as the assignment, either in law or equity, of a claim arising from a fraud. That each successive purchaser of such stock had his remedy against his immediate seller, and the agent and the principal's liability were to the party imposed upon by the original issue of the spurious stock. If these ingenious subtleties were legal truths, and if the passage of the holders of the spurious stock to justice was so complicated and involved by common-law technicalities, how necessary was equity jurisdiction to the attainment of a remedy in this case, and how right it was in the legislature of Pennsylvania to invest this Court with plenary powers to right the wrongs of all the victims of this stupendous fraud, if we did not possess it before. But there is nothing in these niceties. On the occasion of every successive assignment of this so-called stock, new certificates issued to the transferees; and to the existing holder of these certificates the Bank of Kentucky must respond, whether the certificates were issued by the Philadelphia, New York, or any other transfer agency. No doubt some of these false certificates were sold in New York, and new certificates issued from that agency in the honest conviction that the former were what they appeared to be. For this, no blame could be attached to the New York Agency, which throughout acted with perfect fidelity. The *bona fide* holder of every certificate issued by either of these transfer agents has a primary and direct claim against the Bank of Kentucky, either to be admitted as a corporator of that bank, or, if that is impracticable from the excessive issue of stock, to be compensated by the bank for the fraud practiced upon him. In *Davis vs. The Bank of England*, 2 Bingham, 393, although the question did not directly arise in the case, the Court of Common Pleas, in delivering their judgment, say: "We are not called on to decide whether those who purchase stock transferred to them under *forged powers* might require the bank to confirm the purchase to them, and to

pay them the dividends on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries. But, to prevent, as far as we can, the alarm an argument urged on behalf of the bank is likely to excite, we will say, that the bank cannot refuse to pay dividends to subsequent purchasers of such stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank in the books which the law requires them to keep, and for keeping which they are to receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? Now, if this is sound as to government stock transferred by forged powers, what is to be said of corporation stocks, originally spurious, but transferred from time to time, through the agency of the corporation itself to innocent purchasers? Why certainly, as against the *bona fide* holders of such stock, the corporation would be estopped from going beyond its last certificate in any question arising between the corporation and such holder, touching the obligatory force of such certificate on the corporation."

This language places the decision, as to the class of spurious certificates under consideration, in the case at bar, upon a ground which is not open to the plaintiff. It plainly concedes the necessity for privity. It plainly negatives the claim that the transferree of a certificate, without subsequent action by the corporation, could obtain a better title than his transferror. The citation of this case in the *Schuyler case* was pertinent, as this element appeared in both cases. The citation of it by JUDGE BOWIE in the case of *Tome*, was an absurdity, as it is against the conclusion reached by him.

The case of *Tome* asserts no new principle of the law

of agency. It simply misapplies a familiar one. It asserts the rule correctly. It asserts that the same rule applies to corporations and to individuals. It assumes that the act of the agent, to be binding upon the principal, must be in the principal's business, and within the scope of the agent's authority. And yet it holds that a bald forgery of the principal's signature to an instrument purporting to divest the principal of his property, is within the scope of an agent's authority. This decision stands alone. It does not derive any color of sanction from any case cited in the opinion. It is in conflict with the Schuyler case, upon which it relies. There is nothing in the Titus case which supports it. That case proceeded upon the assumption that two previous decisions had established the law of New York to be that the issue of a certificate raised an estoppel, in favor of an innocent purchaser.

The recent decision of that Court in *Western Maryland R. R. vs. The Bank*, merely follows the *Tome case*, re-asserting with evident satisfaction, the doctrine peculiar to Maryland, that forgery is within the scope of an agent's duty, although he is not employed to commit forgery.

This decision can have no significance in this Court.

In Re Bahia R'y Co., L. R. 3 Q. B., 584, it was held that the company, which made a transfer and issued a new certificate upon a forged signature, was liable to the purchaser of the new certificate. The Court expressly decided that the action could not be sustained upon the ground of negligence, and placed its opinion upon the ground that the statute imposed upon the company the duty of keeping a correct registry, and that the doctrine of estoppel therefore applied. In this, as in all other cases where the doctrine of

estoppel has been applied, the party held bound *intentionally* did the act upon which the estoppel was founded.

This is said by BARON BRAMWELL, in deciding Hart's case, L. R., 5 Exch., at page 115, to be "no novelty." It simply enforces upon any one called to act upon the presentation of an order, by another who is acting in good faith, the duty of determining, then and there, the validity of the order. The acceptance of the order, and action upon such acceptance by the party presenting it, or his assignee, binds the acceptor.

The Court lay great stress upon the terms of the statute making certificates of stock *prima facie* evidence of title, but the true ground of the decision is stated by BARON BRAMWELL, placing it upon the same ground upon which a banker who pays a forged check is estopped.

The National Bank Act contains no provision touching stock certificates, and the defendant's by law authorizes the delivery of a certificate only to one who is already a "stockholder." It never issued a certificate to plaintiff. Hence, the *Bahia R'y case* has no application.

This disposes not only of the Bahia Ry. case, but of a number of cases which proceed upon the same principle, beginning with *Davis vs. Bank of England*. This is the very principle upon which the Schuylkill Bank case proceeded. The quotation made by JUDGE BOWIE from the decision in that case related to actual transfers made by the company upon its books, and certificates issued in pursuance thereof the person to whom they were issued being innocent. The issue being made directly to such holders, no question arose as to whether the subsequent purchaser acquired a better title than the original holder. It is

strange, indeed, that the learned Court of last resort of Maryland, should so misunderstand that case.

The same element appears in the Schuyler case.

A careful analysis of this case, as reported, will show that the classes or persons who were held entitled to recover, were as follows:

1. Persons who owned genuine shares, and held certificates therefor, the shares having been transferred on the books to others by the company's transfer agent.

2. Persons who had purchased spurious certificates, but which had been properly transferred upon the books of the company.

3. Persons who had purchased genuine certificates, which had been surrendered for transfer, and received spurious certificates in return.

4. Persons who had, in good faith, purchased stock from Schuyler, or from the firm of R. & G. L. Schuyler. This stock was held to create a liability, *because Schuyler had authority to sell stock forthe company, and did sell such stock*, and used the proceeds for his own benefit and that of the company, indiscriminately. (See the paragraph at page 61, beginning with the words, "but conceding," etc., and the succeeding paragraphs, ending with that upon page 63, which concludes with the words, "and the accounts for seven years show that all these kinds are treated on the same footing as genuine shares.")

Who could doubt the right of any of these classes to recover upon these facts? Who can find any thing in this decision to give color to plaintiff's claim in the present action? There are expressions in the elaborate and some-

what rhetorical opinion which seem to do so, but they must be understood as having reference to the facts of that case.

Neither in that case nor in the Schuylkill Bank case, is there any suggestion that the mere purchaser of a stock certificate will get a better title than that which his vendor possessed. Nor does either case contain a syllable which sustains the claim that the corporation will be affected by any dealing of its agent, unless that dealing be made ostensibly and apparently upon its behalf. *Every certificate which was made the basis of recovery against either corporation was issued by the agent acting upon behalf of the corporation, so far as the original holder knew.*

The judge who decided the Schuyler case would be amazed to see the construction put upon his language by the Court of Appeals of Maryland.

The obligation of even a negotiable instrument, like other writings obligatory, depends upon its due execution and delivery. The delivery of such an instrument, as a general rule, in order to create an obligation, must be voluntary; and, to be voluntary, it is essential that the character of the instrument be known to the maker, as well as that the act itself should be intended by the party. If the manual act of delivery be not voluntary, the instrument is a nullity, in whose hands soever it may come, unless the maker has so acted in respect thereto as to estop him from denying its validity.

DeCamp vs. Hamma, 29 Ohio St., 467. McILVAINE, J.:

"A promissory note has no legal inception or vitality until it is delivered to some person as evidence of a subsisting debt."

Hall vs. Wilson ,16 Barb., 548.

"Whether an acceptor of a bank bill is liable on it, depends upon his having issued the acceptance, intending it to be used. No case has been decided where the acceptor has been held liable, if the instrument has not been delivered by the acceptor to another person."

Baxendale vs. Bennett, 3 Q. B. D., 531.

Daniel's Negotiable Instruments, Sec. 273, and authorities cited.

Clark vs. Boyd, 2 Ohio, 56.

Roberts vs. McGrath, 38 Wis., 52.

Chipman vs. Tucker, 38 Wis., 43.

Roberts vs. Wood, 38 Wis., 60.

The law of agency can not be put out of this case.

Under the principles of the law of agency, the board of directors could not bind the company by a fictitious certificate, issued to their secretary, to enable him to borrow money from a bank for his individual benefit. Even the *Schuylkill Bank case* establishes this statement. At page 235, the Court say:

"It is true that the directors of a bank are but its authorized agents, and that they can incur no obligation binding on the corporation, except while acting in the mode prescribed by and within the limits of the charter. The corporation is altogether a distinct body from the directors. So far as the act incorporating the Schuylkill Bank delegates authority to the directors, they possess and may exercise it; not as constituting the corporation itself, but as its statute agents, the directors being a board, and not a corporate body. *U. S. Bank vs. Dandridge*, 12 Wheat., 64; *Dana vs. The Bank of the U. S.*, 5 Watts & Serg., 267; *Salem Bank vs. Gloucester Bank*, 17 Mass., 29, 30. But the *management* of the affairs of the bank is committed to them by the express terms of the charter. They are made the representatives of the corporation, with plenary power to regulate its concerns according to their best discretion and judgment. *Dunn vs. Bank U. S.*, 5 W. & S., 246. Being

but agents, they can not exceed the authority granted by the charter. If they do, their principal is not bound by their unauthorized acts."

See also, *Scovill vs. Thayer*, 105 U. S., 143.

The case of *Salem Bank vs. Gloucester Bank*, 17 Mass., 1, is directly in point. Notes of the defendant's bank, designed for use as currency, had been prepared in the usual form, and signed by the cashier; they only required the signature of the president to make them complete, so that they would pass by delivery. While in this State they were stolen, the president's signature forged, and the notes put in circulation. Recovery was sought by the holder upon the ground of the bank's negligence. The action was not sustained. The Court say, p. 30:

"Whatever might be the opinion of the Court in the case of a direct damage happening to any one in consequence of the negligence or mismanagement of the officers of a bank, we are clear that, for the indirect and remote consequence of negligence in this case, the corporation is not answerable. The notes, as they lay in the bank, were harmless, and could impose upon no one. They are, in fact, waste paper, until they receive the signature of the president. In this situation they were stolen, and they are made to resemble a bank note, by the felonious act of the thief, or some person associated with him. Why should the corporation be answerable for notes thus fabricated. The negligence of their officers was the cause of loss to none but themselves; and it is only by superadding forgery to negligence, that harm is done. The negligence may be theirs, but the forgery is not; and it is not easy to see any equity in obliging them to pay for the crimes of another. As well may it be said that if a bank note be filled up by the cashier, intended to be issued as a one dollar note, and a space be left large enough to insert the word, hundred, and the word be fraudulently inserted, it became the note of the bank for one hundred dollars."

It will be said that this case is distinguishable from the

one now in hearing upon the ground that the theft of the notes, and the subsequent forgery, were not committed by an agent or officer of the bank. That is an immaterial difference. Suppose that the cashier had forged the president's signature, the bank would not have been liable, because the forgery of signatures was neither within the real or apparent scope of a cashier's duty. In *Foster vs. Essex Bank*, 17 Mass., 478, the cashier did commit a theft of property of which the bank was a depository. The Court held that the bank was not liable. We quote at length from the decision in this case, as it is in point, and the principles enforced are stated with great clearness. At page 508 the Court say:

"The point, then, is narrowed to this consideration, whether the corporation, as bailee, is answerable in law for the depredations committed on the testator's property by two of its officers; and here it being thought there was some discrepancy in the authorities, we have felt ourselves obliged to examine minutely all which have been cited, and all others having a bearing on the question.

"It was contended by one of the counsel for the plaintiffs, as a proposition universally true, that the principal is civilly answerable for all frauds done by its agents; and he is supported in the use of this language by a doctrine of Lord Kenyon in the case of *Doe vs. Martin*, and also by Lord Ellenborough in 1 Camp., 127. And yet it must strike the mind of every man of sense, that this universal proposition will admit of, and indeed, upon principles of common justice, actually requires considerable qualifications. No one will suppose, if my servant commits a fraud, relative to a subject that does not concern his duty towards me, that I shall be civilly answerable for such fraud. If I send him to market and he steps into a shop and steals, or upon false pretences cheats the shop-keeper of his goods, I think all mankind would agree that I am not answerable for the goods he may thus unlawfully acquire; and yet, the proposition, as stated, will embrace a case of this kind. The proposition can be true only when the agent or servant is, while committing the fraud, acting in the business of his

principal or master; and this was the state of things in both the cases which are cited to support the proposition; and they go upon the principle of an implied authority to do the act."

The cases cited by JUSTICE MILLER, at page 11, of 105 U. S., are applicable to the question under discussion, in all respects.

The Schuyler case seems to have been pressed upon this Court in the argument of *Pollard vs. Vinton*, and as usual, in support of propositions to which it really gives no sort of countenance. This Court was more careful in examining it than other Courts have been. *Pollard vs. Vinton*, presented a case of "pure agency." So does the present cause. The act of a cashier in issuing a certificate is an act of "pure agency," of the simplest character. This Court saw no resemblance between the Schuyler case and *Pollard vs. Vinton*. There was none. The same case was pressed upon the Court of Appeals of Virginia in *De Voss vs. Richmond*, 18 Grattan, 338, in a cause which arose upon the issue of a city bond, which was decided upon the authority of the class of cases to which *Davis vs. Bank of England*, *The Schuylkill Bank vs. Kentucky Bank and Bahia Ry. Co.*, belong, but the Court declined to follow the case of Schuyler. The case was evidently vehemently cited, and was, as usual, erroneously cited. At pages 362 and 363, it is apparent that the Court doubted the soundness of *North River Bank vs. Aymar*, and that class of New York cases.

The Court of Appeals of Virginia found no difficulty in discovering the distinction between the class of cases to which *Davis vs. Bank of England* and all other cases named belong, and the class to which the present case belongs.

The case of *Scovill vs. Thayer*, 105 U. S., 143, may be properly referred to here.

In that case, the officers of the Fort Scott Mining Company over-issued stock, advertised it to the public as genuine, and sold the over-issued stock—issued in excess of its authorized capital stock, to innocent persons.

The Court say, on page 151:

"It would seem to follow that, if he is not estopped by his own acts, he is not by the acts of the agents of the Fort Scott Coal and Mining Company, in representing the company, by advertisements and otherwise, as having a capital of $400,000.

"The officers of the company had no authority to make these representations, and the public no right to trust them. Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. The laws secured to the public and the creditors an infallible mode of ascertaining the real capital of the company. They were bound to know that the law permitted no such increase of its capital stock as the company had attempted to make, and that any representation that it had been made was false.

"As forcibly suggested by counsel, a creditor who has been defrauded by misrepresentations of the real capital of the company has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him can not entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders, who have taken no part in it."

The Supreme Court of New Jersey has recently declared that the case *Udell vs. Atherton*, expresses the settled law upon the subject to which it relates.

Kennedy vs. McKay, 14 Vroom, 288.

The effort of my learned adversaries to apply to this case the rule which this Court has established in reference to the negotiable bonds of municipalities, must necessarily

fail. The cases cited and relied upon by them— *Wilson vs. Salamanca*, and *Co. of Scotland vs. Thomas*,—do not sustain, but overthrow their position. The powers of the municipal officers under the various statutes which have been under consideration, in which the action of such officers has been upheld in favor of *bona fide* holders, notwithstanding the intervention of irregularities in the methods persued by them, have been not only discretionary, but *quasi judicial*. Their judgment, evidenced by their certificate, has been held by this Court to be a sufficient shield to innnocent purchasers. What discretionary power is possessed by either president or cashier in reference to the issue of a stock certificate? None whatever. The action of these officers is purely ministerial—purely clerical. The certificate is to be issued only to a stockholder. He must be a stockholder before he can call for a certificate. Being a stockholder, he is entitled to call for a certificate as a matter of right. The corporation itself has no discretion in the matter. The officers have but to fill up the blank and sign their names. The statute invests the power of government of the bank in the directors. They might, by by-law, appoint the teller, the book keeper, or any other employee, to the duty of issuing certificates. No matter who does it, he is a mere agent.

I here leave this branch of the case, respectfully submitting that it appears that the act of Moores was not an act done in the course of his employment, and does not, therefore, bind the defendant.

This brings me to the second general question for discussion in this cause.

Negligence.

I will consider the several propositions hereinbefore made touching this branch of the case, in the order in which they have been stated.

Repeating that the only negligence imputed to the defendant is that which is embodied in the statement that the president entrusted the cashier with his signature to a blank certificate, I respectfully submit:

1. That a principal has a right to assume that his agent will act honestly.

Baxendale vs. Bennett, 3 Q. B. D., 525.
Lehman vs. R. R. Co., 14 Rep., 165.
(Opinion by Mr. Justice Woods.)
Arnold vs. Cheque Bank, 1 C. P. D., 588.
(Opinion by Lord Coleridge.)

2. It is not negligence to entrust a cashier with a blank which he may fill up as a non-negotiable instrument, in view of the fact that he ordinarily possesses power to divert the currency and negotiable securities of the bank, and to put his name to negotiable paper to an unlimited extent which will bind the bank, as by means of certification of checks, and the making of drafts, etc. As well might one be charged with negligence in entrusting a flint-lock musket to one who was already armed with a breech-loading Remington rifle.

2. There was no negligence in law, because there was no relationship between the parties which imposed upon the defendant the duty of care.

This is an elementary principle of the law of negligence to which it is not necessary to cite authority.

The plaintiff and defendant were entire strangers to each other. There was at no time any contract between them, or any negotiation.

I repeat the statement that this is but an action for damages for a false representation. It is the action of *deceit*. Such action can only be maintained by the party to whom the representation is made. In *Horn vs. Cole*, 51 N. H., 287, it is said:

"The principle involved is the same, whether the question is raised in a suit to recover damages for the false representation, or redress is sought by estopping the party to prove the falsehood of the representation. Both cases go on the same general ground, that the party is responsible for the consequences of his false representation."

That there must be privity between the parties is well settled. It is not necessary to cite authorities in this Court to this proposition. In the exceedingly interesting case of *Wells vs. Cook*, 16 Ohio St., 69, the Court say:

"We have been able to find no case which transcends the limits thus defined—no case which purports to hold, or is decided on the principle, that if A makes a false and fraudulent representation to B, meaning that C, and C alone, shall act upon it, and B thereupon assumes to act upon it, and suffers damage, B can maintain an action against A for the deceit. And as transactions of the kind last supposed must be of frequent occurrence in every commercial country, the fact that no such case can be found, is strong evidence that such a doctrine is unknown to the law."

To the same effect is the case of *Peek vs. Gurney*, L. R., 6 H. L., 377, in which case the defendant, as one of the promoters of a new joint-stock company, had issued a prospectus, false, to his knowledge, as to the business which it

was proposed that company should buy. This prospectus was issued for the purpose of attracting subscriptions to shares. The plaintiff bought a number of shares from one of the original subscribers, relying on the truth of this prospectus, was injured thereby, and brought the action. It was held that he could not recover, as the prospectus was not intended to induce such action as he had taken. On page 411, LORD CAIRNS says:

"During the course of the argument I took the liberty of putting to the learned counsel for the appellant, a case which I think was not answered, and to which, so far as I know, no answer can be given that would be favorable to the appellant. I put the case of a person having built a house, and desiring to sell it, he comes to me and wishes me to purchase it; he describes it as a highly advantageous purchase, and makes statements of facts to me with regard to the house which are untrue and are misrepresentations; but I decline to purchase, and our overtures come to an end. He subsequently sells it to some other person, upon what terms I know not. That other person completes the purchase, and that other person, desiring to raise money on mortgage, applies to me to lend him money. I lend him money upon a mortgage of the house. The facts stated to me originally turn out to be untrue, and are so material as that the house, not being as represented, becomes comparatively worthless. I then apply to the original vendor, remind him of what he told me, and complain to him that my money lent upon mortgage has been lost, and I commence an action against him for damages to recover my loss. I ask, could such an action be maintained? I know of no authority for it, and I am of opinion that an action of that kind would not lie."

The same rule applies in all cases of negligence.

Bingham vs. R. R., 29 O. S., 367.

Hounshell vs. Smith, 7 C. B. N. S., 731.

Southcote vs. Stanley, 1 Hurl. & N., 247.

Nicholson vs. R. R., 41 N. Y., 532.

In all of these cases the rule is distinctly stated that actionable negligence exists only where the one whose act causes or occasions the injury owes to the injured person a duty, created either by contract or by operation of law, which he has failed to discharge.

This general proposition is not disputed by my learned adversaries, but they say that the element of privity is supplied in this case by the character of the instrument declared upon. It is claimed by them that a certificate of stock is a "continuing representation," so that, if false, it gives a right of action to any one who may purchase it. This proposition requires close scrutiny. A negotiable instrument confers a right of action, not because it is a "representation," but because it is negotiable. It is so declared by statute. Because all persons are authorized to rely upon the signature without inquiry, the doctrine of negligence applies to it, and the holder, however remote, may estop the maker by the maker's negligence in allowing such an instrument to get into circulation. But it has been explicitly decided in the Exchequer Chamber, that it is limited to negotiable instruments.

Swan vs. Australasian Co., 7 Hurl. & N., 603.
Same Case, 2 H. & C., 176.

The Court of Appeals of New York has declared the label upon a bottle to be a "continuing representation," in *Thomas vs. Winchester*, 2 Seld., 397. This decision is not in accord with the views of other Courts.

It was evidently disapproved of by the Supreme Court of Ohio in *Wells vs. Cook*, 16 O. S., (See page 70). But this case was placed upon the peculiar ground that the labelled

article was a dangerous poison, and the Court found a distinction between cases where the negligence involved danger to human life, and all other cases. Whether the distinction be well or ill founded is a matter of no consequence in this discussion.

It is quite true that the certificate in question was made directly to Mrs. Moores. But it was not made by the defendant. She is not in position to claim as an innocent purchaser of a certificate which ran in favor of her vendor. But the question here is whether she occupies a position that will enable her to impute negligence to defendant in reference to the manner in which it took care of its stock certificate book. Not being a stockholder, she had no interest in that relation. Not being a member of the general public who had purchased upon the faith of a certificate running in favor of some one else, and thus acting upon a belief created by the certificate that she was buying stock, she could only claim the existence of a relationship, even if certificates were technically negotiable, by establishing that she was dealing with the bank through Moores. That remits her entirely to the question of agency, under which her counsel will probably decline to assert any claim.

What possible interest could one situated as Mrs. Moores was on July 15, 1867, have in the manner in which defendant kept its blanks in its office? The only possible danger to her was that a fictitious certificate might be issued to some one which she might buy, but no such thing happened.

In *Johnson vs. Credit Lyonnais Co.*, 3 C. P. D. 32, it was held that where one purchased from another tobacco, lying in a warehouse, and standing upon the warehouseman's books in the name of his vendor, H. who also held dock

warrants for the hogsheads of tobacco. The owner negligently left the warrants in the hands of H, and allowed the tobacco to remain to his credit upon the books of the warehouseman. While this state of affairs continued, H fraudulently sold the tobacco to an innocent purchaser. Held, that he was not estopped by this negligence to claim his tobacco. LORD C. J. COCKBURN, delivering the opinion, after declaring that the plaintiff had clearly been negligent, proceeds to say:

"But whether this negligence of the plaintiff will, under the circumstances, give to the defendant any ground of complaint which can be enforced in point of law, is a very different question. Negligence, to afford a ground of action to one who has suffered from it, must have reference to some duty which the party guilty of the negligence owed to him. The law is, in my opinion, correctly stated by Blackburn, J., in *Swan vs. North British Australasian Company* where, after referring to what was said by Parke, B., in *Freeman vs. Cook* namely, that 'negligence to have the effect of estopping the party, must be the neglect of some duty cast upon the person guilty of it.' He goes on to say: 'This, I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not, in consequence, estopped from denying the title of those who may have, however innocently purchased those goods from the thief, except in market overt.' The same principle would obviously apply to the case of goods fraudulently sold or pledged by a person left in possession of them. The rule thus laid down is applicable here. The plaintiff may have been negligent, and his negligence may have brought on the defendants the loss of the money they have advanced. But the plaintiff owes no duty to the defendants—at least no duty which the law can recognize—either as individuals or as members of the general public.

"The case of *Young vs. Grote*, is, as was pointed out in the case just referred to, plainly distinguishable. 'For

there was a duty on the part of the customer to use due care in drawing the cheque, so as to protect the banker against the risk of forgery in the amount for which the cheque was drawn. This being so, I am of opinion that the negligence of the plaintiff neither estops him from claiming the goods in question from the defendants, nor gives the latter a counter-claim for the money which they have advanced to Hoffman on the security of the goods.'"

It seems to me that this consideration alone eliminates the question of negligence from this cause. But,

3. It is not *actionable* negligence, because:

1. It was not the proximate cause of the injury to the plaintiff.

That negligence to be actionable, must be the proximate cause of the injury, is a principle which is of universal application, and absolutely inflexible. That it applies to cases of the class to which this belongs is well settled.

The case of *Swan vs. The Australasian Co.*, is a leading case upon this subject, and is precisely in point in this discussion. The case was this:

"The plaintiff, the registered owner of 1000 shares in a joint stock company in which the shares could only be transferred by deed, executed by both transferror and transferree, employed a broker to sell for him some shares in another company, which were also transferrable by deed only. The broker represented to the plaintiff that it was necessary for him to execute ten blank forms of transfer. The plaintiff accordingly signed, sealed, and delivered to the broker, ten forms of transfer in blank, to be filled up by him for the transfer of the shares in the other company. The broker only used eight of the blank forms for that purpose, and, having stolen the certificates from a box deposited at a bank for safe custody, he feloniously filled up the two remaining forms as transfers respectively of 500 of the plaintiff's 1000 shares in the first mentioned company, and having forged the attestations he delivered the transfers, together with the certificates, to *bona fide* purchasers for value, and on their being

presented to the company, they removed the plaintiff's name from the register of shareholders, and placed thereon the names of the purchasers. Held, that the transfers were void, and that the plaintiff was not estopped by his negligence from insisting that the property in the shares did not pass under them:

"Negligence to operate as an estoppel, must be the proximate cause of the loss.

"The doctrine of estoppel by executing instruments, in blank, is confined to negotiable instruments, and does not apply to deeds."

In the report of the case in 2 Hurl. & C., 175, the whole subject is considered, both upon principle and authority, I forbear to make any quotations from the opinions, and hope that the Court will find it convenient to examine them.

In the *Bahia Railway* case it is conceded that the action could not be supported on the ground of negligence.

There is an elaborate opinion by LORD COLERIDGE, C. J., in *Arnold vs. Cheque Bank*, 1 C. P. D., 578, in which *Swan vs. Australasian Co.* is followed, and the authorities generally reviewed. The case was this:

"The plaintiffs, merchants at New York, desiring to transmit £1000 to W. & Co., of Bradford, purchased of S. & Co., in New York, a draft for that amount drawn by S. & Co. on Smith, Payne & Co., London, payable to the order of the plaintiffs on demand. The plaintiffs indorsed the draft specially to W. & Co., or order, and enclosed it in a letter addressed to them which was placed in a letter-box in their office to be posted in the usual way. The letter was stolen by one Hecht, a clerk in the employ of the plaintiffs, who forged an endorsement of W. & Co., and procured the defendants, bankers in London, to present the draft and obtain the money, which was placed by them to the account of a person acting in concert with Hecht, upon whose cheques the money was almost immediately drawn out."

Negligence was alleged against plaintiffs. In the course of the opinion, his Lordship says:

"We are of opinion, however, that there was no evidence of negligence which could operate by way of estoppel to the plaintiffs, and also that the evidence rejected was properly excluded, on the ground that it would not, if admitted, have amounted to any defence.

"Reliance was placed by the defendants on the case of *Young vs. Grote*, 4 Bing., 254. That case, no doubt, must be considered as well decided; but various opinions have been expressed as to the real ground of the decision. In the judgment of Parke, B., in *Roberts vs. Tucker*, 16 Q. B., 560, it was put on the ground that the customer had, by signing a cheque, given authority to any one in whose hands it was to fill it up in whatever way the blank permitted. But we have only to look at the case itself to see that it really proceeded on the authority of the extract from Pothier cited in the judgment of Best, C. J., which makes the inability to recover depend upon the fault of the drawer of the cheque in the mode of drawing it, and is entirely inconsistent with the rule laid down and explained on fuller consideration in subsequent cases, viz: that negligence, in order to estop, must be negligence in the transaction itself; see per Blackburn, J., in *Swan vs. North British Australasian Co.*, 2 H. & C., 181; 32 L. J., Ex. 277. Indeed, in a later case, *Bank of Ireland vs. Evans Charities*, 5 H. L. C., 389, this is stated by Parke, B., himself, to be the true ground of decision. He says: 'In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom i was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment.'

"The rule which is expressed by Ashurst, J., in *Lickbarrow vs. Mason*, 2 T. R., 70:—'We may lay it down as a broad general principle, that whenever one of two innocent parties must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it,'—was, though not expressly referred to, observed and acted on in *Young vs. Grote*, 4 Bing., 254; and it has received illustration and explanation in subsequent cases on the subject which show that the words, "enabling a person to occasion the loss," must be understood to mean, by some

act, conduct, or default in the very transaction in question: see *Freeman vs. Cooke*, 2 Ex., 654; 18 L. J., Ex. 117.

"The correct rule seems to us to be that which is thus stated by BLACKBURN, J., in his judgment in *Swan vs. North British Australasian Co.*, where, referring to the judgment of WILDE, B., below, he says: 'That he omits to qualify the rule he had stated by saying that the neglect must be in the transaction itself and be the proximate cause of leading the party into that mistake; and also must be the neglect of some duty that is owing to the person lead into that belief, or, what comes to the same thing, to the general public, of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy.' *Young vs. Grote*, when correctly understood, is in entire accordance with the rule thus expressed. So in *Ingham vs. Primrose* 7 C. B., N. S., 82; 28 L. J., C. P., 294, also cited to us, in which the negligence was in the destruction of a draft afterwards put together and fraudulently presented; while in the case of *Bank of Ireland vs. Evans Charities*, it was expressly held both that the negligence in order to operate as an estoppel must be negligence, "in or immediately connected with the transfer itself," and further that it must also be "the proximate cause of the loss." We may also refer to the judgment of WILLIAMS, J., in *Ex Parte Swan* 7 C. B., N. S., 400; 30 L. J., C. P., 113, as showing the distinction between *Young vs. Grote*, and those cases in which the neglect, if any, was collateral to the transaction.

"Let us inquire, then, how far there was in this case any actual proof of such neglect, or of any breach of duty to the defendants as members of the general public.

"No authority whatever was cited to us for the contention that negligence in the custody of the draft will disentitle the owner of it to recover it or its proceeds from a person who has wrongfully obtained possession of it. Here, there was nothing in the draft or the indorsement with which the plaintiff had anything to do, calculated in any way to mislead the defendants. It was regularly indorsed, and was then inclosed in a letter to the plaintiffs' correspondents, to be sent through the post. There could be no negligence in relying on the honesty of their servants in the discharge of their ordinary duty, that of conveying letters to the post;

nor can there be any duty to the general public to exercise the same care in transmission of the draft as if any or every servant employed were a notorious thief. It may be said here, as in the case of *Bank of Ireland vs. Evans Charities*, merely substituting for the "custody of the seal," "the posting of the letter," and for "the act of transfer," "the receipt of the draft by the defendants." "If there was negligence in the custody of the seal, it was remotely connected with the act of transfer. The transfer was not the necessary, or ordinary, or likely result of that negligence. It never could have been but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed." And in that case it is asked: 'If such negligence could disentitle the plaintiffs, to what extent is it to go?' If a man should lose his cheque-book, or neglect to lock the desk in which it is kept, and a servant or a stranger should take it up, it is impossible to contend that a banker paying his forged cheque would be entitled to charge his customers with that payment.'"

In *Bank of Ireland vs. Evans Charities*, 5 H. L. C. 388, a secretary had affixed the seal to false certificates of the trustees of the charities, who were incorporated, and upon these transfers were made. The trustees subsequently sold the shares which had thus been wrongfully transferred. The bank refused to transfer them. An instruction to the jury that the negligence of the trustees, if it had contributed to the injury, would estop them, was held erroneous. The principal ground of the decision was that such negligence was too remote.

Chipman vs. Tucker, 38 Wis., 43, was the delivery of a note and mortgage in escrow. *Ogden vs. Ogden*, 4 O. S., 182, was a case of delivery of a deed in escrow. In each case there was a wrongful delivery, and, subsequently, an innocent purchase. In each case the maker was held not liable.

In *Telegraph Co. vs. Davenport*, 97 U. S., the defense relied upon negligence of the plaintiff. JUSTICE FIELD says, (p. 373):

"We are unable to perceive any necessary connection between her brother's insolvency and the misappropriation of her funds, and the forgery of the children's names, or between such forgery and her omission to open her box in 1871, and examine its contents."

2. Mere negligence will not create *estoppel in pais*."

Estoppel in pais only arises where there is wilfulness or *malafides* upon the part of the defendant.

Said COCKBURN, C. J., in 2 H. & C., p. 188:

"As regards the alleged estoppel by reason of the plaintiff's negligence, I am of the opinion that *negligence alone, although it may have afforded an opportunity for the perpetration of a forgery*, by means of which another party has been damnified, is not of itself a ground of estoppel. The rule relating to negotiable instruments stands upon peculiar grounds."

In *Brant vs. Virginia Coal & Iron Co.*, 93 U. S., 326, the second proposition of the syllabus is:

"For the application of the doctrine of equitable estoppel, there must generally be some *intended deception* in the conduct or declarations of the party to be estopped, or such *gross negligence* on his part as amounts to constructive fraud, by which another has been misled to his injury."

To same effect,

Henshaw vs. Bissell, 18 Wall., 271.

McKenzie vs. Steele, 18 Ohio St., 38.

Hawes vs. Marchant, 1 Curtis, C. C., 136.

Gutchman vs. Robert, 109 Mass., 53.

"To bring a case within the principle of *Pickard vs. Sears*, and *Freeman vs. Cooke*, it is essentially necessary that the representation or conduct complained of, whether

active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party."

COCKBURN, C. J., 2 H. & C., 187.

The *Schuyler case* was rested upon the ground of *gross negligence* (See page 58), so far as the question of negligence entered into the discussion.

It will not be argued that the facts of the present case disclose either wilfulness or gross negligence upon the part of the defendant. If the act of the president was negligent, it was merely ordinary negligence, which, upon the above principles, would afford no right of action.

Baxendale vs. Bennett, 3 Q. B. D., 525, applies here. It appeared that defendant gave his blank acceptance to H., and authorized him to fill it up. H. returned it unused, and still blank. Defendant then placed it in an unlocked drawer, whence it was stolen, and, afterward, it was filled up and used. Upon suit brought, it was held that defendant was not liable, inasmuch as his negligence, which was conceded by the Court, was not the proximate cause of the loss of plaintiff, and because, after the return of the paper, he had never authorized any one to fill it up, and that he had *never issued it, intending it to be used.* Every word of the opinion of BRAMWELL, L. J., applies to the present case. He says (p. 530):

"But a crime was committed in this by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he estopped? What he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on

that belief? Where is the limit if the defendant is estopped here. Suppose he had signed a blank check, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker, the drawee, but to the holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a check or bill to the signature, would the signer be liable? I can not think so. But what about the authorities? It must be admitted that the cases of *Young vs. Grote* and *Ingham vs. Primrose*, go a long way to justify this judgment; but in all those cases, and in all others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

"But it is said that he has done so through negligence. I confess I think he has been negligent, that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But, then, this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the *Bank of Ireland vs. Evans Trustees* shows, under such circumstances, there is no estoppel. It is true, that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument."

The act of R. B. Moores was a technical crime. It was under the Ohio statute simple forgery.

Section 7091, Rev. Stat. of Ohio, provides as follows:

"Whoever falsely makes," etc., "any certificate authorized by the laws of this State," etc., "or transfer or assurance of money, stock, goods," etc., "or any power to receive and transfer stock or annuities," "with intent to defraud," etc., "is guilty of forgery."

That Moores falsely made this certificate with intent to make that use of it which was made, and which, therefore, was a fraudulent intent, is beyond doubt.

But it is not necessary, or even important, that this act should be held forgery. It is sufficient that it was the independent, individual act of Moores, intervening between the act of defendant alleged to be negligent and the act which caused the injury. This destroys connection between the act of negligence and the injurious act.

This Court has passed upon this subject. *R. R. Co. vs. Reeves*, 10 Wall., 188; *Milwaukee R. R. Co. vs. Kellogg*, 94 U. S., 475.

In this case the Court says (p. 475):

"It is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, *and that it ought to have been foreseen* in the light of attending circumstances."

The whole subject is well considered in *Wharton on Negligence*, Sec. 73 *et seq.*

There is an interesting opinion in a bill of lading case by JUDGE HAMMOND, reported in 9 Fed. Rep., 135. I allude to it because the whole subject is examined with great learning and care, both upon principle and authority. I cite, also, upon the same subject, further:

The Loon, 7 Blatch., 244.

Bank vs. Laveille, 52 Mo., 380.

Fellows vs. Steamer, 16 La. An., 316.

The same principles apply to an action upon a warehouse receipt, which is an instrument of similar character, and constantly used as a basis of monetary transactions.

Second National Bank vs. Washburn, 19 O. S., 419, and authorities cited.

In that case, which does not differ from the one at bar in principle, the action was based on a warehouse receipt, instead of a stock certificate. A warehouseman had, by mistake, on application of the owner, issued, at different dates, two warehouse receipts for the same property; the last receipt was assigned for value to the Second National Bank of Toledo, and, on its application, the warehouseman delivered to it the property. The holder of the original receipt thereupon replevied the property it represented from the bank, and prosecuted the suit successfully. The bank brought its action against the warehouseman to recover the value of the property; held, that the bank could not recover, because a warehouse receipt "is not, in a technical sense, like a bill of exchange, a negotiable instrument," because the assignee of the receipt occupied no better position than his assignor, to whom the receipt was originally issued; and he, being the owner of the property, could not have recovered, the second receipt having been issued to him by mistake, and the warehouseman having already, so far as the owner was concerned, responded to his obligation by the delivery of the property; and because, if any false representation was made by the issuing of the second warehouse receipt, it was made to the owner, and not to his assignee, and the rights thereby accruing, if any, to the owner, could not be assigned by him, because of want of privity between the warehouseman and the assignee.

The present Chief Justice of the Supreme Court of the United States was of counsel in that case. The suggestion that *negligence* of the warehouseman would estop him, is not made. JUDGE WHITE, in delivering the opinion of the

Court, makes the very distinction for which I am now contending. At page 426, he says:

"The decision in *Griswold vs. Haven*, 25 N. Y., 596, cited and relied upon by the plaintiff's counsel, does not sustain him. The estoppel in that case was held to arise on the false representations of Wright, one of the defendants, that the grain mentioned in the receipts was in store and in good order. This representation was made directly to and was relied upon by the plaintiff in making the advances."

That this was the ground of the estoppel enforced in that case, is apparent from the comments made upon the cases of *Grant vs. Norway*, (10 C. B., 665), *Coleman vs. Riches*, (29 E. L. & E. R., 323), and from page 607 of the report, where SELDEN, J., in delivering the opinion of the Court says:

"I have no hesitation, therefore, in holding that, under the circumstances of this case, the defendants were bound by the representations of Wright. I mean the verbal representations; not the representations contained in the receipt."

3. *Estoppel in pais* never arises upon the mere statements of a non negotiable instrument, and reliance upon it alone is at the peril of the party so relying.

Certificates of shares are non-negotiable instruments.

Bank vs. Lanier, 11 Wall., 369.
Schuyler case, 34 N. Y., 30.
Mechanics' Bank case, 13 N. Y., 599.
Shaw vs. Spencer, 100 Mass., 382.

This principle being established, it follows that the certificate received by the plaintiff having been purely fictitious —a mere forgery, indeed—the issue of which was never authorized by the defendant—the plaintiff could acquire no rights under it. This would be true even if she had pur-

chased a certificate from any third person, *i. e.*, a certificate in favor of a third person. It is a universal principle, that the transferree of a non-negotiable instrument—nothing else affecting the defendant appearing—acquires only the rights of his transferror. If this be not true there is no distinction between negotiable and non-negotiable instruments.

The promissory note of A, in the hands of B, duly executed and delivered, contains a recital of all the essential facts to constitute a complete legal liability of A, to B. It recites the fact of indebtedness, its amount, and declares that it is based upon due consideration—"for value received." If it be payable to B, "or order," it is immaterial, of course, whether there was a consideration or not, as to one who is an innocent holder. If the words "or order," or equivalent words, be omitted, however, and there was, in fact, no consideration, the paper is void in the hands of a transferree, and no one ever heard the doctrine of *estoppel in pais* invoked in aid of the demand upon such paper. Undoubtedly, if it were shown that the defendant, the maker of the paper, made any representation outside the paper, or authorized any to be made, which induced the holder to take it, he would be liable, but the liability would arise, not upon the paper, but upon the extraneous conduct.

Mr. Bigelow, in his work on Estoppel, page 480, lays down the doctrine thus:

"The representation—a term which embraces both words and silence, acts and concealments—is always *external* to any contract or transaction between the parties."

And he refers to *Clark vs. Sisson*, 22 N. Y., 312, as illustrating it. This was an action upon a bill which had been accepted for the drawer's accommodation, the acceptors de-

fending upon the ground that it had been discounted usuriously by the plaintiffs. The plaintiff contended that defendants were estopped by the recital of "value received" in the bill itself. The Court held otherwise and said:

"It is true that the words 'value received' were a part of the instrument, and these words imported that the bill was drawn and accepted for value in the hands of the drawee. It may also be assumed that the plaintiffs thought that they were purchasing an obligation which bound the parties. But these circumstances do not relieve the case. Neither the drawer or acceptor made any representations to the plaintiffs *beyond the language of the contract itself.* But if the very words of a contract are to be taken as a representation of facts, which estops the party making the obligation from interposing a defense inconsistent with that representation, then all contracts must be deemed valid which appear so upon their face, and not only usury, but fraud and duress, can no longer be alleged. Such is not the rule of law."

The case of *Swan vs. Australasian Co.*, is directly upon this point, holding that the doctrine of estoppel only applies to negotiable instruments.

Bills of lading are transferable, just as certificates of bank stock are; they create the same appearance of a right of property; they are used in the commerce of the world as instruments of credit, constantly. Yet, the transferree of such a bill, if wrongfully issued by an agent of the carrier, acquires no right against the latter.

In *Shaw vs. R. R. Co.*, 101 U. S., 557, this Court defines the character of a bill of lading, and declares it to be "a symbol of ownership of the goods covered by it—a representative of those goods," and the Court goes further, and holds that the Statutes of Pennsylvania and Missouri, making such bills "negotiable," do not impart to them all the

negotiable qualities of bills of exchange and promissory notes.

The Supreme Court of Massachusetts, and that of Ohio, have declared that only the legislative power can enlarge the list of negotiable instruments.

100 Mass., 382.

14 O. S., 396.

The case of *Athenaeum Society vs. Pooley*, 3 De Gex & J., 300, should be cited upon this question:

"Before the Lords Justices. Debentures under the common seal of a joint stock company incorporated under 7 and 8 Vict. C., 110, were given to Pooley in July, 1854, in pursuance of an arrangement made between Pooley and the chairman of the directors, which was a fraud on the company. These debentures were afterward bought by Laurie in the market in the ordinary course of business. The transfer to Laurie was registered in the books of the company, and interest was paid to July, 1855, inclusive, but the matter was not made known to the shareholders till December in that year, when an investigation of the affairs of the company took place, in consequence of which the directors resigned, and the further payment of interest was refused.

"Held, that Laurie, though a purchaser *bona fide* for value without notice, yet being only the purchaser of a chose in action not assignable at law, must take it subject to the equities attaching to it, and that under the above circumstances, neither the registration nor the payment of interest had the effect of a confirmation of Laurie's title, and that he ought to be restrained from suing at law upon the debentures."

The case was decided by the Lords Justices Turner and Bruce, who both delivered opinions.

On page 301 it is said:

"The question then resolves itself into this, whether, if the transaction could not stand as between Mr. Pooley and the company, Mr. Laurie cannot be in any better position? *Prima facie* he certainly can not, for he is a mere assignee

of a chose in action; and the general rule is perfectly well established, that an assignee of a chose in action must take subject to the equities which affect the assignor. It has been contended on behalf of the appellant, that whether the assignee takes subject to those equities or not, depends upon the question whether he made all the inquiries which it was incumbent upon him to make. I cannot, however, find any authority in which any such principle has been laid down. The general rule which is founded on good reasons, has been universally recognized without any such qualification, and if we were to break in upon it now, it is impossible to foretell the amount of mischief which would follow such a dangerous innovation upon the settled law. There is no doubt, however, that the persons liable to the demand, may so act as to create against themselves an equity preventing the application of the rule—there may be such dealings between the assignee and the party originally liable, as to preclude that party from insisting as against the assignee, upon rights which he might have claimed as against the assignor. It has been contended that there have been such dealings in the present case, that the registration of the transfer to Mr. Laurie, and the payments which have been made of interest to him, give him a better right than Mr. Pooley, and prevent the company from disputing as against him their liability under the debentures."

Here was a registration of the shares by the company, and a continuing affirmation that Laurie was the holder of its valid debentures. He constantly drew his dividends. Again say the Court:

"As regards the registration, what more is registration than an entry in the books of the company, of the fact that the debt has been transferred? That entry was made by officers of the company, but was never communicated to the shareholders at large, nor in any way recognized by them. How, then, can the shareholders be bound by it? Can it be contended that the entry of the original debt would make it binding upon them? If not, how can the entry of the transfer have any such effect? Then, as to the payment of interest, I do not give any opinion as to how the case would have stood, if it had appeared in the reports of the

directors that these sums had been borrowed, and that interest had been paid upon them, and such reports had been approved and adopted by the shareholders at a general meeting. For in this case the payments of interest which are relied on, were never entered in any report made by the directors nor in any way communicated to the shareholders. The case stands simply thus: Persons standing in a position analogous to that of trustees, improperly borrowed money, and made, without the knowledge of their *cestuis que trust*, payments of interest upon the debt thus improperly contracted. If the *cestuis que trust* were not bound by the original loan, neither can they be bound by the payments of interest made under such circumstances."

This case is commented upon adversely by VICE CHANCELLOR MALINS in *Webb's* case, L. R., 19 Eq., 302, but the criticism proceeds upon a ground which does not affect the above quotation, or the principle which it asserts.

Thus it is apparent that the mere negligent care of a non-negotiable instrument, by means of which it obtained circulation, will not constitute an estoppel, but that negligence must be supplemented, or preceded, or accompanied, by some wrongful or fraudulent conduct of the party to be charged, which directly affected the complaining party, and cuts off a defense that would otherwise be open. The law books will not furnish a decided case in opposition to this proposition. The *Tome case* is not in conflict with it, as that case decided that the actual fraud itself was the act of the principal, although perpetrated by the agent. The *Titus case*, 61 N. Y., is not in opposition to it, as that case proceeds upon the assumption (whether true or false is wholly immaterial) that the act of the secretary bound the corporation, in favor of an innocent purchaser, under the rules of the law of agency.

7. The plaintiff was guilty of contributory negligence. She knew that she was dealing with an agent, who was acting for himself. She knew that the security which he was offering her was an interest in the bank, his principal. He was offering her ninety-one one hundredths of the entire property of the bank. The certificate which he offered her was not a certificate that he, Moores, or any third person, owned shares, but a certificate that *she, the plaintiff, owned them.* This put her upon inquiry.

It may not be quite accurate to classify this as contributory negligence. But no matter what it is called. It is an instance of a sale by an agent, of his principal's property for the agent's benefit, and the law always requires, in such cases, an inquiry of the principal. She relied upon Moores' verbal statement. She could not rely upon the signature of the president, in such a dealing with the cashier, not only because she knew that the certificate was false unless the verbal statements were true, but because the president and cashier united had no power to pledge the bank's property to secure the cashier's individual debt. The board of directors could not do it.

The case of *Lanier vs. Bank*, 11 Wallace, 369, is a strong authority in favor of the view for which we contend. The substance of that decision is that the statement upon the face of the stock certificate that the shares represented by it are "transferable only upon the books of the company, and upon surrender of such certificate," is a statement which commands the attention of a proposed purchaser, and upon which he has a right to rely. That is to say, he has a right to rely upon that assurance, that the shares named in the certificate will not be transferred without the surrender

of that certificate, and he may recover if the certificates indeed represented genuine shares, should such shares be transferred to another without the surrender of the certificate. If this be so, it follows that he is also notified, by this recital of the certificate, that shares can only be transferred in one way, *i. e.*, upon the books, upon the surrender of the certificate. Hence, he is admonished that he will not obtain a complete title, *as against the corporation*, until surrender of the certificate, and transfer upon the books. He is also admonished that, in every case, the surrender of an old certificate must precede the issue of a new one. In the present case, the plaintiff did not even purchase an equity, but a void instrument.

This is the substance, also, of the case of *R. R. vs. Bridgeport Bank*, 30 Conn., 230, and all the cases in which the obligation of the corporation to make no change in the registry until the outstanding certificate has been surrendered has been enforced, This includes the *Schuyler case*, and the *Schuylkill Bank case*. All of them are authorities for this defendant, although they constitute the main reliance of the plaintiff. The Massachussetts cases are to the same effect. They require the corporation to make transfers only upon the proper order of the stockholder, and, while securing him against wrongful transfer, protect the holder of the new certificate, upon the authority of *Bahia Ry. Co.* and similar cases. 109 Mass., 115; 123 Mass., 110; 126 Mass., 345.

In this connection, the argument will be made that the act of Dr. Dorsey, in signing the blank certificate, made it possible for Moores to perpetrate the fraud. So the act of one who entrusts matches to his agent enables him to com-

mit an act of incendiarism. But this does not impose liability upon the principal.

In *Lowery vs. Western Union Telegraph Co.*, 60 N. Y., 198, one B. sent a telegram by defendant's line to plaintiff, asking for $500. By the negligence of defendant's employees, the message was changed to $5,000, which sum plaintiff sent to B., who, upon receipt, appropriated it to his own use and absconded. In an action to recover damages, held that defendant's negligence was not the proximate cause of the loss, as the embezzlement of B. did not naturally result therefrom, and could not reasonably have been expected. "The most that can be said is" say the Court, "that by the negligence of the company, *an opportunity was afforded Brown to commit a fraud upon the company.* This does not, within the cases, make the company chargeable with the loss."

Precisely the same ruling was recently made by the the Supreme Court of Ohio in *First National Bank Barnesville vs. Western Union Telegraph Co.*, 30 O. S., 554.

See also *Dickson vs. Reuter*, L. R., 3 C. P., 1.

The statement, so often repeated, that "where one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," is much better adapted to use in a town-meeting than in a Court of justice. It expresses no truth. It tends to mislead. If accepted literally, it has no meaning whatever; or, if any, an absurd one. The innocence of a defendant being established, he is always, *ipso facto*, entitled to judgment. He can only be made responsible in any action upon the ground that he has made and broken the contract sued upon, or done the act which creates liability.

It makes no difference that the act was done by an agent. It must still be his act, and the relation between himself and the alleged agent must be such as to make him responsible upon the principles of the law of agency. The maxim is usually employed in the discussion or decision of such cases, and it is perfectly plain that in all such cases it only tends to create confusion and to mislead. The act of alleged agency was either an act for which the principal is liable according to the rules of law applicable to the subject, or it was not such an act. This question being determined, *the subject is disposed of.* And yet, before this maxim can be applied, that question must be settled. Hence, the maxim can not aid in its settlement. This is true, unless the words "he who has enabled such third persons to occasion the loss" are to be given an indefinite scope and meaning. If this be so, then the man who sells a gun is responsible civilly for damages to one who receives a wound from it, or the man who loans a horse will be liable to one who sustains injury by the carelessness of the driver, etc., etc.

If this language were always understood to mean that a principal is liable for the acts of his agent, within the scope of his employment, then it would be well enough, for, whilst it would be of no value, it could do no harm.

Language has sometimes been used from the bench which would indicate that some sort of responsibility attaches to a principal from the fact that his employment of the agent holds him out as worthy of confidence—indorses him, as it were, to all the world. This would make the principal liable for every act or contract of the agent, whether it had reference to the principal's business or not. There is certainly no warrant for this view. See the admirable com-

ment of JUDGE COMSTOCK upon this subject, 13 N. Y., p. 635.

Commenting on this alleged maxim, LORD COLERIDGE observes in *Arnold vs. Cheque Bank*, 1 C. P. D., at p. 587, in a paragraph above quoted:

"It received illustration and explanation in subsequent cases on the subject which show that the words "enabling a person, etc.," must be understood to mean by *some act, conduct, or default, in the very transaction in question.*"

The Supreme Court of Louisiana has reformed and restated the rule thus:

"Where one of two parties, neither of whom has acted dishonestly, must suffer, he shall suffer who, *by his own act*, has occasioned the confidence and consequent injury."

Isnard vs. Torres, 10 La., An., 103.

And the Supreme Court of Michigan has explained it in a leading case which is in point in the present cause, to-wit: *Holmes vs. Trumper*, 22 Mich., 427. It was a case of an altered note.

"The general principle that, "where one of two innocent parties must suffer," etc., upon which the plaintiff in error relies, as stated by us in *Burson vs. Huntington*, decided at the last October Term, is one which, in its application is mainly confined to cases where the third person, whose act or default has occasioned the loss, has been in some sense or to some extent, the agent of the party who is made to sustain the loss, or when the latter by his acts or negligence, has authorized the other party to consider him as such, and in all cases, (unless this is an exception) where, upon the general principle relied upon, a party has been held liable upon a written contract on the ground of negligence alone, without reference to such agency, he has only been held liable upon it in the shape in which he allowed it to go from his hands, and not as criminally altered by another. Thus, if the acceptor of a bill pay and take it up, and then, without cancellation or any mark to denote its payment, throws it into the street, and it gets into the hands of a *bona fide* holder before apparently dishonored or overdue, the acceptor

will be liable upon it. See *Ingham vs. Primrose*, 7 C. B., (N. S.) 82; *Foster vs. McKinnon*, Law Rep., 4 C. B., 704 But even such a case does not wholly, perhaps exclude the idea of agency; since a party thus throwing his acceptance into the streets may be said, as between him and the innocent holder, to have authorized any one who might pick it up to negotiate it.

"As between the maker of commercial paper, and an innocent party acting upon the faith of the paper, which the maker has voluntarily and intentionally executed and even negligently allowed to go out of his hands and to get into circulation, the general principle we are discussing would preclude such maker from showing that the paper was not intended to have the effect which its appearance indicated, though as between the original parties, many things might be shown to defeat it. It is substantially a representation upon which he has authorized innocent parties to act; and when they have thus acted, he must be held by the contract indicated by the representation thus made.

"But this reasoning extends only to the paper as made and issued by him, or as he has thereby authorized some other person to change its terms; and the note in this case being a complete legal instrument when issued, to hold him bound by the contract as altered by the forgery, involves the idea that the person committing the forgery was his agent in committing it (a ludicrous absurdity), or at least that he had authorized innocent third parties so to treat him."

The doctrine of *estoppel in pais*, is a doctrine which applies in cases of fraud and to the party guilty of it, and not to "innocent" persons.

And as fraud can only be perpetrated in connection with the making of a contract, the defendant, if a party to the fraud, is so because he is a party to the contract with which it is connected.

"In the absence of any relation of trust or confidence, fraud, in respect to property, arises only in connection with some kind of contract, and is determined by the character of the means employed to induce the owner to enter into some

agreement in regard to it, contrary to his interest."

Hoyt vs. Minnick, 19 O. S., 467.

"Fraud, from its very nature, can exist only in connection with some form of contract."

2 Hilliard Torts, 137.

Manifestly, as the fraud was perpetrated in connection with a contract upon behalf of Moores himself, and known by the other party to be his individual contract, the bank cannot be liable for the fraud. It is said, however, that the certificate of stock appeared to be genuine; that it bore the genuine signatures of the proper officers, etc.; that the act of the bank created the appearance of genuineness, and thus enabled Moores to consummate his individual fraudulent purpose. It is not claimed that the defendant authorized the fraudulent act, or intended that the blank certificate should be so used, or that it derived any benefit from the fraud.

Whatever this maxim may mean, it does not authorize one who deals with an agent, knowing that the power of the agent depends upon the existence of a condition precedent, to take the agent's word for the existence of the condition. The opinion of CHIEF JUSTICE SHAW, in *Mussey vs. Beecher*, 3 Cush., p. 517, deciding a cause in which an agent, having power to buy a fixed quantity of goods, bought in excess of that amount, says:

"The argument is, that the defendant ought to be bound, because Pierce was his agent, and he, by his letter of attorney, had put it in his power to make such purchase. This, it appears to us, assumes the very point to be proved. The plaintiff knew that he was limited to $2,000; he knew, therefore, that, if he had purchased to that amount, his power, by its own limitation, was at an end. If it were otherwise, a power to purchase to the amount of $2,000 would operate as a power to purchase to an unlimited

amount. But it is urged that, upon this construction, no one could safely deal with the agent. This objection, we think, is answered by the consideration, that no one is bound to deal with the agent; whoever does so, is admonished of the extent and limitation of the agent's authority; and must, at his own peril, ascertain the fact upon which alone the authority to bind the constituent depends. Under an authority so peculiar and limited, it is not to be presumed that one would deal with the agent who had not full confidence in his honesty and veracity, and in the accuracy of his books and accounts. To this extent, the seller of the goods trusts the agent, and if he is deceived by him, he has no right to complain of the principal. It is he, himself, and not the principal, who trusts the agent beyond the expressed limits of the power, and therefore the maxim where one of two innocent persons must suffer, he who reposed confidence in the wrong-doer must bear the loss, *operates in favor of the constituent, and not in favor of the seller of the goods.*"

How much more forcibly this language applies to a case where the agent is known to be dealing in his own behalf.

WILDE, J., dissented from the judgment in *Mussey vs. Beecher*, upon the authority, in part of *North River Bank vs. Aymar*. In that case, which related to a negotiable instrument, CHIEF JUSTICE NELSON, (afterwards one of the justices of this Court) dissented:

"Wherever the duty of inquiry is created by the circumstances, the difficulty in obtaining information affords no excuse for the failure to make the inquiry."

Shaw vs. Spencer, 100 Mass., 390.

Jones vs. Williams, 24 Beav., 62.

Suppose that instead of delivering to Mrs. Moores a certificate of stock, R. B. Moores had delivered to her a certificate of deposit in the usual form, accompanied by his statement, that he had made the deposit in her favor. Who would argue that such a certificate, delivered by the cashier

as security for his individual debt, would bind the bank? The case would be within *West St. Louis Savings Bank vs. Parmelee*, 95 U. S. The president's signature would add nothing to plaintiff's case, as the president and cashier united have no power to bind the bank by any form of instrument to secure the individual debt of either. The actual deposit of the money would alone bind the bank, and plaintiff could not accept the cashier's verbal statement that he had made such deposit. Without the verbal statement, she would know the falsity of the certificate.

NEGLIGENCE IS NOT ALLEGED IN THE PETITION.

The second amended petition (R. 8) supersedes all preceding petitions, and stands as the sole assertion of the plaintiff's claim of right.

It is not necessary to use the epithet negligence in a pleading based upon negligence. But it is necessary to charge it in some definite way. This petition does not do so, either expressly or impliedly.

It charges as follows:

That Moores, being cashier, represented himself to be a stockholder, and that Dorsey and Moores, one as president, and the other as cashier, issued the certificate in question. The charge is epitomized in the last paragraph but two of this pleading, (page 11), except that it omits to charge the president with direct participation in the fraud. Thus: "By means of the said *fraudulent conduct of said R. B. Moores, as officer and cashier of defendant*, in issuing said certificate without a surrender of any certificate for stock represented thereby, and without any transfer to the plaintiff of any

stock on the books," etc., "and by the defendant so fraudulently permitting and procuring said acts to be done," etc. This is not a charge of negligence, but of express fraud. It assumes that the acts of Dorsey and Moores were acts of pure agency, that the two officers named acted in concert, on behalf of the bank, and that the bank is chargeable for that reason. The claim is based upon the representation of genuineness, and the fact of invalidity. It is not based upon any other act, neglect or default, preceding or attending the issue. Unless the act of issuing were negligent, no negligence is charged, even inferentially. Even here, the inference of negligence is precluded by the affirmative allegation that it was intentionally fraudulent.

This matter is not left in doubt by the record, as the principal purpose of the last amendment was to omit the charge of negligence which was contained in the first amended petition (R. p. 7.) The words in that pleading were: "And by *the negligence* of the defendant in *permitting* said acts to be done by its said cashier and officers." In the last amendment these words are omitted, and the words above quoted from page 11 substituted, to-wit: "And by the defendant so fraudulently permitting and procuring said acts to be done by its said cashier."

The effect of this pleading is to limit the inquiry in the cause to the question whether the defendant procured Moores to do the things complained of, *i. e.*, whether the agency extended to the transaction with plaintiff, in all its parts. As said by Lord Cairns, in *Peek vs. Gurney*, L. R., 6 Eng. and Ir. App., 403, touching a similar pleading:

"It is true that a good deal was said during the argument about the proceedings to obtain a settling day on

the stock exchange; but, although the obtaining of a settling day on the stock exchange is mentioned in the pleadings, it is not made any ground for relief. Your lordships will observe that, in the 39th paragraph of the bill it is stated that 'the plaintiff made the purchases of shares, and entered into the contracts of membership, solely on the faith of the statements contained in the prospectus.' That allegation excludes any reference to any other alleged misstatement."

I respectfully submit, therefore, that no question of NEGLIGENCE arises upon this record, and that the entire discussion upon that head of the law is irrelevant. The defendant must be held, if at all, upon the ground that it procured the acts complained of to be done.

IT IS NOT ALLEGED THAT MOORES OWNED STOCK ON JULY 15, 1867. NOR IS IT MATERIAL WHETHER IT DOES SO OR NOT.

The statement (p. 9) that Moores represented himself to be a stockholder, and that he "appeared upon the books" as a stockholder, are not equivalent to an allegation that he was a stockholder. These are but matters of evidence, not conclusions from evidence. Such matter is not pleadable at all, but, if pleaded, it cannot have the effect of an allegation of the existence of a state of facts which it tends to prove.

There is every reason why this pleading should be strictly construed. A claim that plaintiff held a certificate for genuine shares, and a claim based upon the same instrument as a fraudulent and void certificate, representing no stock, should never be permitted in the same petition. The claims are necessarily inconsistent, and the motion to compel election would doubtless have been sustained, had not the Court been of opinion that the petition only alleged one of these grounds of action. Nothing is gained in support

of this pleading by the statement (p. 10) that Moores transferred "all the stock owned by him, or standing in his name on the books," because if there was no previous allegation that he owned stock this does not allege that he transferred any.

This consideration disposes of any allegation of error in the exclusion of Exhibit "K" (p. 57). This was offered, by plaintiff, and excluded by the Court, *sua sponte*. The defendant did not care to object to it.

But there are other answers to the point made upon this exclusion, to-wit:

R. B. Moores testifies, without contradiction, that, prior to July 15, 1867, he had delivered all of his certificates to a firm in Cincinnati for hypothecation; that they were hypothecated, and that he never obtained any of them afterward (p. 39). Plaintiff did not offer to contradict this. He did not offer any proof explanatory of Exhibit "K," Exhibit "K" does not tend to show that Moores surrendered any of the certificates. It only tends to show an attempted transfer *upon the books*.

The Court will readily infer that that action of the Board was an attempt to enforce the alleged lien of the bank, under by-law 15 (p. 57), the attempt being made in hostility to the pledgees of the certificates, and persons claiming under them. The exhibit itself was prepared in 1870, long prior to the bringing of this action. The provision of by-law 15, referred to, was declared by this Court to be invalid in *Lanier vs. Bank*, 11 Wall.

The plaintiff in error once secured a reversal in this Court, in this cause, upon the suggestion of a remote possi-

bility that the certificate represented genuine shares, and that therefore, there was a still more remote possibility that she had been prejudiced by a ruling made upon a demurrer which raised a question as to the effect of coverture in reference to the Statute of Limitations. The scene is now to be changed somewhat, and the Court is to be asked to find that plaintiff was possibly prevented from proving that she did buy actual shares from Moores, and was injured by their transfer to another. There is neither allegation, proof, or offer of proof, upon this matter. This exhibit was offered to prove that transfers were sometimes made *without* surrender of certificates.

Nor is there any justification for the proposition that Mrs. Moores could as matter of law, acquire title to stock owned by R. B. Moores, and become entitled to a transfer, in any method other than that pointed out by the by-law, which is in strict accordance with a usage so universally known and understood that the Courts take judicial notice of it. *Lanier vs. Bank*, and all similar cases.

The case of *The Bridgeport Bank*, 30 Conn., 230, gives no color to plaintiff's claim in that behalf. That was a case where the Court found, upon the evidence, that the certificate held by plaintiff was a genuine certificate for shares. The certificate was issued to Schuyler for 90 shares, and was by him indorsed and delivered to the plaintiff. Subsequently the stock was transferred to others upon the books of the company, without the surrender of the certificate. The case does not differ at all from *Lanier vs. Bank*. If Moores had delivered to plaintiff one of his genuine certificates, and subsequently transferred to others the stock represented by it, the cases would have been identical. The proof here is that

all of his genuine certificates had been transferred before July 15, 1867. That is the proof which JUDGE ELLSWORTH declares wanting in the Bridgeport Bank case, and which the defendant could have furnished if the fact had existed. Plaintiff's petition alleges that no surrender was made on her behalf, and that no transfer was made to her (p. 11).

The certificates are simply deeds of conveyance of title, and, without the production of such a deed no one can assert title against the corporation. The corporation is bound to protect the title of the holders of such title deeds from transfers without their production, duly assigned, and it, in turn, is entitled to assume that no one can claim to have acquired stock by any other mode. This is the teaching of all the cases upon the subject, and the necessary result of any rational reflection upon it.

In conclusion, I respectfully submit that the only question in the cause is one of agency, and that question, reduced to definite form, is simply whether an agent can pledge his principal's property to secure the agent's debt, when the lender fully understands that the debt is the agent's debt, and that the property is the principal's property. The request to this Court so to rule, goes far beyond the position of the plaintiff's counsel in *Pollard vs. Vinton*. This case is precisely what that would have been if Cobb & Co. had agreed to sell and ship cotton for that plaintiff, upon their individual account, and had represented to him that they had done so, and had delivered to him the bills of lading in pursuance of the agreement. That is the precise attitude in which this plaintiff presents herself before this Court.

Respectfully Submitted.

WILLIAM M. RAMSEY.

Counsel for Defendant in Error.

111-156

Supreme Court of the United States.

OCTOBER TERM, 1883.

CAROLINE A. MOORES, PLAINTIFF IN ERROR,

vs.

PIQUA NATIONAL BANK, OF PIQUA, OHIO,
DEFENDANT IN ERROR.

ORAL ARGUMENT OF J. W. WARRINGTON, PRINTED AND FILED BY LEAVE OF COURT.

JUDD & DETWEILER, PRINTERS.

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The facts of this case, the questions involved, and the way they arose, the errors assigned, and our propositions of law, are stated in our brief, and need not be here repeated.

I.

In the discussion of the first proposition, I desire, first, to invite attention to the precise nature and effect of a certificate of stock; and, second, to the question of whether the transfer and issue of such stock is to be treated as the act of the corporation, or merely of its agents.

Nature and Effect of Stock Certificate.

First. A certificate of stock is a written representation and a continuing affirmation of title, in a specified person or his assignee, to a certain portion of corporate capital; and it is a voucher that the name of the designated owner is on the proper stock-books of the company. The right

to issue such instruments is a franchise quite as much as the right to be a corporation, and the reason for such a franchise and its exercise is to benefit the corporation and its stockholders by enabling the public to deal freely and safely in its shares. The very word "certificate" signifies *testimony*, and imports that the party certifying knows the facts that he certifies. The representation so made is an act which is obviously capable, in the ordinary course of events, of bringing the corporation into legal relations with third persons generally. Such an act carries with it a duty of care in favor of the public, because the persons with whom legal relations may be established, as a natural result of the act, cannot be defined or compassed by anything less than the public at large. Beyond these purposes a certificate of stock has no reason to exist. It has no other object to accomplish. Such a representation implies an intention that it shall be acted on by another, and if he does so, estoppel arises against denying the truth of what is represented to be the fact.

1st. As to the nature and effect of certificates of stock.
Holbrook v. *N. J. Zinc Co.*, 57 N. Y., 616, 621–3.
In re Bahia & San Fran. R'w. Co., L. R., 3, Q. B., 584, 593–8.
See Bramwell's remarks on above case, in *Simms* v. *Tel. Co.*, L. R., 5, Q. B. D., 204.

Ashby v. Blackwell, 2 Eden's Reps., 299. This case negatives entirely the suggestion that the Bahia case is founded upon a statute, because Ashby's case was decided more than a century prior to the Bahia case, without reference to any statute, and was quite as strong in support of the doctrine contended for as the Bahia case.

Freeman v. *Cooke*, 2 Ex., 654, 662.
Picard v. *Sears*, 6 Ad. & E., 469, 474.
N. Y. & N. H. R. R. Co. v. *Schuyler*, 34 N. Y., 30, and * pp. 69, 70–1.

Farmer v. *Legg*, 7 T. R., 186, 191.
Machinists' Nat. B'k v. *Field*, 126 Mass., 345–8.

Gray, C. J., speaking of a certificate of stock which had been issued upon a forged endorsement, said: "The certificate issued to him is, as against the bank conclusive evidence of his title."

Webb v. *Comm'rs of Herne Bay*, L. R. 5, Q. B. 642, 650–3–4.

2d. As to the benefit derived to the corporation by the issue of its stock certificates in safe and convenient form for circulation, and the corresponding measure and extent of its duty in that behalf.

Bank v. *Lanier*, 11 Wall., 369.
Johnson v. *Laflin*, 103 U. S., 800–4.
R. R. Co. v. *Robbins*, 35 O. S., 483, 500.
Schuyler's Case, 34 N. Y., 51, 2, 3.
R. R. Co. v. *Howard*, 7 Wall., 415.

3d. Certificates of stock are clearly and substantially distinguishable from bills of lading and warehouse receipts.

Pollard v. *Vinton*, 105 U. S., 107, 111, 112.
Bank v. *Wallbridge*, 19 O. S., 419, 420, 5, 6.
B. & O. R. R. Co. v. *Wilkins*, 44 Md., 11.

Additional to the distinctions in this behalf which are made by the cases cited, and also in printed brief, I desire to call attention to this: That the similitude between certificates of stock and bills of lading or warehouse receipts is not at all perfect; if they were in all respects analogous, the argument on the other side would be much more formidable. But there is a manifest distinction between cases of tort and contract. The execution of the letter of attorney accompanying certificates of stock and its delivery, transfers the whole property in and represented by the certificate and destroys the relations between the corporation

and the transferor of the stock; whereas the endorsement of a bill of lading or warehouse receipt may indeed transfer the title to the property represented thereby, but leaves in tact and remaining unassignable the contract of carriage or storage between the shipper or warehouseman and the owner.

Act of Corporation, not of Agent.

Second. When the certificate bears the genuine signatures of the proper corporate officers, together with the genuine corporate seal, the question concerning the issue of such stock and the reliance to be placed in it is this: Whether or not the principal has done an act for which it is in law liable, and not whether an agent has done an act for which the corporation is liable.

The defendant is a corporation—an artificial being, a mere idea—and for that reason must act, must come in contact with the world, only by its officers and agents. Whenever a transaction of any kind is in dispute, which purports to be that of a corporation, its origin and completion are due alone to human agency. If the act be within the corporate objects at all and require as part of its execution, and really bear the corporate seal, the power to do it necessarily involves the inquiry as to where the seat of authority rests. To say that it is in the corporation adds nothing. Human action is the essential force to put it into motion to accomplish anything in its behalf. We must learn then, in each case, how far back among the officers the authority to perform the act in fact resides. When this is ascertained there can be no difficulty in fixing the legal identity between the agency doing the act and the ideal principal. And when this identity is made out, there is no longer any question of agency. The problem is, what power had the principal itself to do the act; and what liability of the principal itself results from doing the act?

The National Banking Act prescribes the mode for or-

ganizing banking associations, and fixes the minimum capital that such associations respectively shall have, and also provides (Sec. 5142) that "Any association formed under this title, may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title." (Sec. 5133, 6, 8.)

Section 5139 provides that, "The capital stock of each association shall be * * * transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association."

Pursuant to these powers, the defendant bank adopted sections 12, 15, and 16 of its by-laws. The former of these sections provided a mode for increasing the capital of the bank. The next one limited transfers of stock on the part of stockholders who are liable to the association either as principal debtors or otherwise, "without the consent of the board of directors;" and then requires that the certificates of stock shall contain upon them notice of this provision." The next, section 16, provides that—

"Certificates of stock, signed by the president and cashier, may be issued to stockholders, and the certificates shall state upon the face thereof that the stock is transferable only on the books of the bank; and when stock is transferred, the certificate thereof shall be returned to the bank and canceled and new certificates issued."

Obviously the statute (Sec. 5139) vested in the banking association plenary power concerning the mode of transferring stock. It is equally clear that the association, by section 16 of its by-law, transmitted the same and all of the power which the statute vested in it to its president and cashier. The association could have delegated its power in this behalf otherwise, to other officers, with such restrictions as to have secured to itself and to the public absolute protection against the frauds of its officers. But it chose to delegate its power—all of its power in this respect—to

those officers, with no provisions or restrictions beyond such as are found in the statute, which were obviously for its benefit, viz., notice of the rights which it sought to reserve as against debtor stockholders, of the mode prescribed for transfers, and of required surrenders and cancellations. It having been admitted at the trial that the certificate in controversy bore the genuine signatures of the president and cashier and also the corporate seal of the defendant corporation, there can be no difficulty in fixing the legal identity between the officers whose signatures the certificate bore and their principal—the corporation itself; because, (1), considering either the original capital or the association's right to increase its capital, in connection with the certificates which were prescribed for representing the capital, the certicate in question was clearly within the association's objects; and, (2), whether the disputed certificate was or shall be rightfully presumed to represent either a portion of the original capital or of any increase thereof, that certificate was a symbol of an acknowledged power in the officers executing it. The certificate, so far as its execution and delivery were concerned, did not represent merely a part, but, on the contrary, the whole of the corporate power in that behalf. It is precisely the same as if the whole body of the association, acting through its stockholders under the powers delegated by section 5139 of the statute, had authorized and participated in the act of issuing the disputed certificate. Suppose the directory had been the instrumentality in whom the association had vested its power in respect to issuing such certificates, could it have been said that the question here is one merely of agency? Suppose the entire body of stockholders had reserved to itself this power, and had acted accordingly, could it then have been urged successfully, or even rationally, that the question was one of mere agency? Yet Congress vested no greater powers in the body of stockholders, with respect to the execution and delivery of certificates, than were

transmitted through that body to the president and cashier. It seems to me to be impossible to state any case of identity between the instrumentality exerting the power and the corporation principal, if that identity is not found here. Observe that we are not here considering the act, with reference to which the instrument employed to represent it can be used for purposes other than those for which the corporation principal intended it, viz., as a representation and affirmation of ownership and a voucher that the owner's name is on the corporate stock-books. It is in this respect wholly unlike bills of lading and warehouse receipts, which, as before shown, are intended for purposes of carriage and storage, but may be and are often used for entirely different purposes.

Observe also, that we are not now discussing any question concerning the relations between the plaintiff in this case and the defendant's cashier, or any question of inquiry, or *bona fides*, in this transaction. Our effort here is merely to show and state the real question of law involved, when the validity or binding force of such a certificate as the one here is in controversy.

Our claims in this behalf are fully established by—

Wilson v. *Salamanca*, 99 U. S., 499, 504.

Pollard v. *Vinton*, 105 U. S., 7, 12.

Scotland Co. v. *Thomas*, 94 U. S., 682, 691–2.

Eaglefield v. *Marquis of Londonderry*, L. R., 4, Ch. Div., 693.

S. C. 26 Weekly Reporter, 540; approved by Malins, V. C., in *Phosphate Sewage Co.* v. *Hartmont*, L. R., 5, Ch. Div., 447; also in 26 Weekly Reporter, 716, 718.

Swift v. *Winterbotham*, L. R., 8, Q. B., 244, 251.

S. C. explained and approved in the principles of law it announces, in *Mackay* v. *Commercial Bank of New Brunswick*, 5 Privy Council, 412.

Nat'l Exch. B'k of Glasgow v. *Drew*, 2 McQueen, 103, 123, 125.

The Western B'k of Scotland v. *Addie*, L. R., 1 Scotch & Divorce App., 145.

Barey v. *Crosky*, 2 Johnson & Hemming, 26.

Sline v. *Croucher*, 1 De Gex., F. & J., 523.

Baron Park said: "In partnerships, where all of the members do not agree in a contract (and it is often that they do not), one partner may bind the others in all contracts within the scope of their ordinary partnership dealings. In those beyond, the individual partners making the contract are bound, not the other partners. But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are, by their own contracts and as much as all the members of a partnership would be by a contract in which all concurred."

S. Y. R'y Co. v. *G. & N. R'y Co.*, 9 Exch., 84.

See also *Lewis* v. *Mayor of Rochester*, 99 Eng. Com. Law, 426.

One of the distinguishing features between the Mechanics' Bank case and the Schuyler case, was this difference between the act of an agent, and the act of a principal. At page 54 of the latter case it was said: "It is transparent throughout the case, that the board of directors, by passive submission or active surrender, conveyed over to Schuyler the substance of all their authority relating to their business in New York."

See also *Bank of Ky.* v. *Schuyler's Bank*, 1 Par. Sel. Cas., 180.

Estoppel.

I insist then that the execution and delivery of the disputed certificate must be treated as an act of the corporation itself, and not merely as the act of its agent, the cashier. If this be correct, it follows as a necessary corollary

that the representation contained in the certificate is that of the corporation itself, and that it was made with the intention that it should be acted upon by Mrs. Moores, the plaintiff. And it is equally conclusive that under the doctrine of *Picard* v. *Sears*, as explained by *Freeman* v. *Cooke*, cited *supra*, and affirmed in the case of *In re Bahia & San Fran. Rw. Co.*, the defendant bank is "estopped from denying the truth of what" it represented "to be the fact." This does not involve the claim that the representation of the certificate is addressed to the world, and consequently warrants strangers to the certificate to deal on the faith of its representation, because the plaintiff is named in the certificate in controversy here, and therefore the very person to whom the representation is expressly made. Of course it is to be observed that the estoppel, in so far as it can be used to compel recognition of the plaintiff as a stockholder, is subject to the qualification stated in our third proposition, which I shall have occasion to notice hereafter. If the issue of the certificate in dispute was in any view of the facts and law *intra vires*, the estoppel must have conclusive force. Indeed, it seems to us, that our position, both with reference to the estoppel and the act of the corporation itself (as distinguished from mere agency), is impregnably fortified by the rules announced by this court in the class of cases known as the municipal bond cases. The analogy, both in form and legal effect, between the recitals of a certificate and an ordinary bond, is complete. It is true that the bond cases refer to negotiable instruments. But, as was said in a recent case, by Judge Force, in the superior court of Cincinnati, which is cited at length in our adversaries brief: "Now, it is true that the bond, the obligation to pay, is negotiable, but the recital, the statement of facts, is not negotiable, and hence the ruling is, that this recital is a representation which is made directly by the corporation to every person who deals with those bonds when once issued."

Moreover, we are interested here with the *issue and delivery* of the certificate, and such a question can never be affected by the doctrine of negotiability.

Decamp v. *Hamma*, 29 O. S., 467, 470–1.
Hall v. *Wilson*, 16 Barb., 548.
Burson v. *Huntington*, 21 Mich., 432.

The bond cases are too numerous and familiar to justify their citation. The whole series show that such recitals as are contained in the certificate of stock in dispute, work an estoppel against the corporation in favor of *bona fide* purchasers.

The case of *Anthony* v. *County of Jasper*, 101 U. S., 693, in no way conflicts with the cases upon which we rely, and it in no way prevents the application of these cases to the one at bar. In that case the great contention was, whether or not an act of March 30th, 1872, which was passed between the determination of Jasper County to issue its bonds, and the time of their actual issue, was applicable to, and a restriction upon, the issue of such bonds. This court held that it was. The statute required the approval and signature of a State officer. In order to escape the statute, the officers antedated the bonds to a time prior to the date of the act aforesaid, which they were seeking to escape; but, in the meantime, the county justice who was to participate in the act of issuing the bonds resigned, and a new justice took his place. This change of office was a public act, and one of which every person could or was bound to take notice. The result was that the antedating of the bonds not only evaded the requirements respecting the State officer, but also fixed the time of their issue antecedent to the election of the signing justice. Hence the bonds were but partially executed, and the signing justice was not justice in fact or in name at the date which the bonds were made to bear, so that it was equivalent to a forgery. The difference between that case and the present one, therefore, is the difference be-

tween a genuine and a forged certificate. That case, then, is not applicable, and requires no further consideration.

Before leaving this subject I shall call attention to the case *In re Land Credit Co., of Ireland*, L. R., 4, Ch. App., 460, where the directors of a trading company, having the authority to accept bills of exchange, devolved the right and power in that behalf, upon their chairman, who accordingly accepted certain bills in consideration of the deposit of certain securities, but the specified amount of such securities was not in fact deposited. The directors affirmed the transaction without knowing of the deficiency in the amount of the deposit. The facts of the case involved the question of whether the company was liable upon such a transaction, and it was held that the bills having been accepted *modo et forma* by the authority of the directory, and the provision as to the deposit of securities being collateral matter, into the observance of which the holder of the bills was not bound to inquire, the company was liable.

See also *Franklin Bank* v. *Johnson*, 24 Me., 490–503.

If it should be urged or supposed that the case in argument is distinguishable from the cases cited, in that the former is one where one of the officers was engaged in a fraud against both the bank and Mrs. Moores, and for that reason was neither engaged in the bank's business nor within the real scope of his authority as cashier; the answer is (1) that from the nature of the act, and the character and extent of the officers' power in that behalf, the *principal itself* was present and engaged in the act, because the officers, in respect to that act, were the *corporation*. This is the effect of the legal identity shown, and consequently the cases cited do not make any such distinction, do not recognize that fact as an exception to the rules they announce, and, on the contrary, decide that where the transaction, as between the officer and the stranger, is in fact in *good faith*, and is also within the corporate objects, and the power to decide as to

the presence of the conditions necessary to its due performance and to perform it is devolved upon certain officers, whose proper execution of the power is manifested and asserted by their official signatures and the corporate seal, the transaction is deemed a corporate act, and is in discharge of the corporate business; (2), that such a distinction would not leave any place or necessity at all for the class of cases so cited, for the reason that, if in order to make the act binding, the officer must invariably be engaged in the business and observing good faith in behalf of the corporation principal, or within the actual duty of the officer towards the corporation, then it could be disposed of, one way or the other, entirely by the rules of agency; and (3) that such an argument would ignore and destroy the well known rule that it is entirely discretionary with sovereign legislative assemblies to designate, either directly or indirectly, the instrumentality which shall be the embodiment of and shall stand for their corporate creatures in respect to specified objects. Such corporative representatives are as inseparable from the corporation, the artificial being, as the members or senses of an individual principal, which are employed in doing a given act, are inseparable from his person. The representatives thus identified are absorbed in the principal itself.

II.

Inquiry not Necessary.

In supporting our second proposition, let us ascertain whether the foregoing is affected in any way by the claim that Mrs. Moores was put upon inquiry and was guilty of contributory negligence in making the contract whereby the cashier obligated himself to assign and transfer to her ninety-one shares of his stock of the defendant bank. In other words, is there any legal reason why a person should

suspect a bank's chosen and trusted cashier of having over-issued its certificates of stock, merely because he represents what, indeed, is true, that he is the owner of some of its stock and offers to assign and transfer a portion thereof, and does, in fact, deliver a certificate in legal form, bearing the genuine signatures of the proper officers and the seal of the corporation? Surely not; because (1) the requirement to surrender old certificates, when transfers were made, was in the interest and for the convenience of the bank, in its accounts and relations with its stockholders, and for its protection against debtor stockholders; besides its cashier's knowledge of the want of a surrender was imputable to the bank, and being a matter in its interest, was thereby fairly waived. By every legal token, the surrender was part of the bank's business. How, then, can its cashier, while attending to the bank's business, be said to have been representing Mrs. Moores? Moreover, the recital of the requirement in each certificate was also notice and a guaranty to those dealing in its stocks that its officers would see to its proper execution; in other words, that the joint decision of the president and cashier, as evidenced by their official signatures and the corporate seal upon the certificate, should bind the bank. Consequently, as it seems to me, it would be unreasonable to the last degree to compel the purchaser or pledgee to see that such surrender is made by the transferror. (Bank of Ky. *vs.* Schuylkill Bk., p. 247; Ashby *vs.* Blackwell, 2 Eden, 299; Bank *vs.* Lanier, 11 Wall, 369; Bridgeport Bank Case, 30 Conn., 270–2; Schuyler's Case, 34 N. Y., 84; Thayer *vs.* Scoville, 105, U. S., 217.) (2.) The statute not only authorizes both of the signing officers to hold the bank's stock in any amount, but also expressly required one of them—the president—to own and hold it in the sum of not less than ten shares (Secs. 5146, 5150); (3.) The certificates in favor of the officers were required, under the by-laws, to be precisely the same in form as those in favor of strangers (Sec. 16), and no limitation of any kind

was imposed upon their right of sale or other disposition of their stock; and, moreover, the signature of one of the signing officers upon certificates in favor of or in the interest of the other, was the act of a disinterested official, acting in the business of the bank when signing under existing necessity or demand for a transfer, and wholly within the scope of his authority, which facts alone, together with the official bonds required of the president and cashier, as guarantees for the faithful discharge of their duties as such officers (By-Laws, Secs. 7 and 8), must be presumed to have been the only safeguard the defendant bank deemed necessary for its protection, and consistent with that license in trafficking in its stock, which, as before shown, is one of the principal features of value to such stocks; besides, any restriction preventing such officers from certifying in favor of either in such manner as to necessitate inquiry, would operate to prevent them from owning and selling stocks altogether.

Titus v. *G. W. T. P. Co.*, 61 N. Y., 237; S. C., 5 Lansing, 250 (this case not only supports the views just expressed, but the judges in the courts below and above there distinguished it conclusively from *Claflin* v. *The Bank*, 25 N. Y., 293, and that class of cases); *Western Md. R. R. Co.* v. *Franklin Bank*, 60 Md.; and *Willis* v. *Fry*, 13 Phil'a, (Pa.), 33; see, also, *Johnson* v. *Laflin*, 103 U. S., 803–5; (4) where one holds a fiduciary position of a character, permitting or requiring him to be in possession of property, with the power or duty of sale, purchasers or pledgees are not bound to inquire into the good or bad faith with which he is discharging the duty or exercising the power. They are authorized to presume that he is acting honestly, even though the pledge be *in his own favor*. *Ashton* v. *Atlantic Bank*, 3 Allen, 217, is directly in point. See also the manner in which the latter case is distinguished and approved, in *Shaw* v. *Spencer*, 100 Mass., 382, 391; *Otis* v. *Gardner*, 105 Ill., 436; *Rumball* v. *The Metropolitan*,

etc., L. R., 2, Q. B. D., 195; (5) when dealing with a person offering corporate stocks or securities, which are executed in due form, their recitals are a sufficient representation and protection as against secret or internal informalities or frauds, provided the statute furnishes power to issue the certificate of stock or the security; "the *bona fide* holder has a right to *presume* the power was *properly exercised*, and is not bound to look beyond the question of its *existence*," *Compton* v. *Cooper's Union*, 101 U. S., 186; moreover, such a holder has the right to presume and rely upon it, that *the internal workings* of the corporation have been properly performed; *Hackensack Water Co.* v. *DeKay*, 39 N. J. Eq., 548; *Mon. Nat'l Bank* v. *Globe Works*, 101 Mass., 5718; and *Fisher* v. *Becksmith*, 30 Wis., 55; (6) the signatures of the president and cashier, and also the seal being genuine, and the sending of the certificate by the cashier to the plaintiff, being in itself a representation that it was valid, inquiry could not, in the nature of the case, have resulted in further information. Moreover, those officers were the only ones from whom knowledge could have been gained, and how cou'd their express statements have been more binding upon the company, than the representations implied from their signatures and the act aforesaid of the cashier? 1 Dillon, C. C., 274, 281, *Bridgeport B'k Case*, 30 Conn., 271; (7) there was no legal connection between the execution of the contract, made and signed by the plaintiff, the cashier, and others, at Cincinnati, and the issue of the disputed certificate of stock at Piqua; because the two transactions are different in kind, were between different parties, respectively; and more than this, it is generally known that the ordinary practice in transfers of stock is that the transferor shall and does procure the transfer to be made. Besides, the bank's books showed the cashier to be then the owner of its stock, largely in excess of the amount in dispute; and (8) if any rule of inquiry were established, its logical result would re-

quire the purchaser or pledgee to trace the pedigree of his certificate to the original issue, because each intermediate act between the wrong and last issue is as much the act of the agent as the first act. (*Schuyler's Case*, * pp. 75–6; see, also, *Ex parte Esterbrook*, 2 Lowell's Decisions, 547.)

III.

Estoppel under Plaintiff's Third Proposition.

Referring to our third proposition, we insist that all the conditions are here present to raise an estoppel against the bank, provided there was not an overissue of the defendant's stock by the issuing of the certificate in dispute; and if there was such an overissue the bank is responsible for the plaintiff's loss. The rule established in the bond cases, before referred to, furnishes complete authority to support the estoppel, under the conditions named. The recitals of the certificate contain a representation which, as before shown, was made directly to the plaintiff with the intention that she should act upon the faith of them. She did so, and in consequence suffered serious damage.

In *Webb* v. *Com'rs of Herne Bay*, L. R., 5, Q. B., 642, it was found that the commissioners were incorporated by a statute for the purpose of improving a town, and were empowered to levy rates and borrow money. For securing the loans they were authorized to issue debentures bearing interest and capable of assignment. The commissioners themselves were expressly forbidden under penalty to accept any contract for carrying out the objects of the statute. They nevertheless bought bricks of one of the commissioners and executed and delivered to him debentures in due form, and registered them according to the requirements of the act. The commissioner receiving them assigned them for value without notice, &c., to the plaintiff. Default in payment of the interest having occurred and suit brought, it was *held:*

"Assuming the transaction to have been illegal, that, as the commissioners had issued the debentures knowing that they might be assigned, they were estopped from alleging that the debentures had been illegally issued; and that the plaintiffs were entitled to maintain an action of mandamus to compel the commissioners to apply their funds in payment of the interest."

Cockburn, C. J., Blackburn, J., and Mellor, J., grounded the right of recovery upon the facts of the *recitals*, in the debentures, precisely the same as was done in the Bahia Railroad case, (pp. 650–3–4.)

Further in support of the estoppel, see *Bank* v. *Lanier*, 11, Wall., 369.

Aside from the estoppel, if there was an overissue, the bank is responsible for the loss sustained by Mrs. Moores.

This is sustained by—

Titus v. *N. T. R'y*, 61 N. Y., 337.
S. C. 5 *Lansing*, N. Y. 250.
N. Y. & N. H. R. R. Co. v. *Schuyler*, 34 N. Y., 30 (cited approvingly in *Merchants' Bank* v. *State Bank*, 10 Wall, 646.)
Tome v. *Parkersburg*, 39 Md., 36, 54, 56.
West Md. R. R. Co. v. *Franklin B'k*, 60 Md.
Willis v. *Fry*, 13 Phila., 33.
B'k of Ky. v. *Schuylkill B'k*, 1 Par. Sel. Eq., 180.
Bridgeport B'k v. *N. Y. & N. H. R. R.*, 30 Conn., 231, 270.
Merchants' B'k v. *State B'k*, 10 Wall., 605, 645.
Monument Nat'l B'k v. *Globe Works*, 101 Mass., 57, 8, 9.
Bruff v. *Mali*, 38 N. Y., 200.

It will be urged by our adversaries that the Schuyler case did not involve any certificate and facts like those in question in the case in argument. In addition to what appears in the report of the case in the 30th New York, to negative such a claim, it will be found by reference to the report

of the same case in the supreme court of New York, (38 Barb., 534,) that the claim is completely overthrown. Ingraham, J., in analyzing the record, at page 547, said:

"From the evidence now before me, these claims arise in the following cases:

"*First.* For the fraudulent act of Schuyler in issuing certificates of stock as held by R. & G. L. Schuyler, for which there was no stock to their credit, and which was not based on any transfer of stock to them, and obtaining from the holders an advance thereon."

It will be likewise claimed that the case of *Bank of Ky.* v. *Schuylkill Bank* did not involve circumstances similar to what are found in this case. But that claim is also disposed of by the language of King, J., at pp. 247, 8, viz.: "In our opinion, therefore, the complainants' title is good so far as they represent holders of spurious stock, whether such holders are the parties to whom it was issued originally, or whether they claim it by direct or remote succession from such original holder."

Additional to the foregoing authorities, it seems to me that the logical result and final analysis of the cases of which the Bahia Railway Company's case and the *Machinists' National Bank* v. *Field*, are a type, is identical with the cases just cited, because the physical surrender of a certificate bearing a forged transfer is equivalent to no surrender at all. There is nothing then left to support that class of cases, beyond what is found in the cases where there is no physical surrender.

IV.

Negligence.

Our fourth general proposition refers to the negligence of the defendant.

The only rational meaning which can be attached to the 16th section of the defendant's by-laws is, that both the

president and cashier shall certify to the recitals of the certificate. Certifying to a blank certificate is certifying to nothing. The only power in this behalf which was given to those officers was to execute and issue "certificates." A certificate pre-supposes the ascertainment of the facts necessary to the exercise of the power, and also the filling of its blanks prior to attaching the signatures and seal. The signing of any of the certificates in advance of the necessity or demand of a stockholder for its delivery was a violation of duty, an abuse of power, and consequently negligence. And permitting a certificate in due form, with genuine signatures and seal, to get into circulation through the fault of the officers authorized to execute and deliver it at all is of itself negligence. Yet the court below would not suffer that question to go to the jury. The theory of the trial Judge, was that the question of the president's negligence, or of the defendant's negligence, had nothing to do with the issues.

In *Milwaukee R. R. Co.* v. *Kellogg*, 94 U. S., Mr. Justice Strong, in the course of the opinion, (p. 474,) said:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster. Though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end. That force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place."

The justice then proceeds to state the well-known exception concerning the intervention of an independent cause, and in that connection uses the language quoted at page 78 of our adversaries' brief. But it is obvious here that the president's act of signing in blank was an essential part of the execution of the certificate. And when he so signed it and placed it in the control of the cashier, he did so with the express understanding that the cashier should fill it out

and deliver it whenever, in the cashier's judgment, the occasion or necessity for its delivery arose. Extensive as the president's powers were in this behalf, it should be borne in mind that they were official powers without any authority in him to devolve them upon another. When the cashier subsequently attached the seal, saying nothing of attaching his own signature, and delivered the instrument, he was in fact alone exercising the powers which had been vested in the president and himself jointly. Legally speaking then, the president's act of signing in blank was so interwoven with the act of final execution and delivery of the instrument that it is impossible to break the line of causation by any effort to separate or distinguish the physical acts of the two officers. When we consider the facility with which stock certificates can and could then be used, the reliance which the public do and then did place in such instruments, the ease with which money could be obtained upon the faith of their recitals and apparent proper execution, and the consequent great temptation to use them, was it not a reckless disregard of the rights of others? Indeed, was it not wantonness to violate the obvious intent of the statute and the by-law in question, to sign and turn over in blank to a single officer such instruments of danger? There could have been no necessity for it. Applicants for transfers would have been required to wait but a short time for the president's eturn to the bank. This the president shows by his own testimony. It is common knowledge that the great corporations of this country, in whose stock the great body of dealing occurs have transfer agencies in particular cities, many miles distant from the places where individuals reside, who are trafficking in and desire transfers of stock, and yet the delays which necessarily occur, in nowise deter people from dealing in the stocks and obtaining transfers of them. Must we not then consider the president's act, and through him the bank's act, relative to this certificate, as having been intended to accomplish the wrong which actually oc-

curred? Is it not then necessarily within the rule stated in *Brant* v. *Virginia Coal and Iron Co.*, 93 U. S. 326? Also, within *Henshaw* v. *Russell*, 18 Wall., 271? Certainly it is within the class of cases stated to represent an exception to the rule, announced in the last cited case at page 271 of the opinion.

Rule.— Where one of two Innocent Persons, etc.

But whatever may be said of the question of negligence and its consequences, it certainly cannot be that the defendant can escape the well-established rule, that where one of two innocent persons must suffer by the fraud of a third party, he who has, by his trust and negligence, enabled such party to commit the fraud must answer for the loss.

This rule has had frequent application, and if it were not assailed in this case, we should not think of doing more than citing it. Our adversaries will contend that the rule is meaningless; indeed, that there is no such rule at all.

This court has had occasion to apply the rule several times, notably in the *Merchant's Bank* v. *State Bank*, 10 Wall., 646.

Dair v. *U. S.*, 16 Wall., 5.
Pompton v. *Cooper's Union*, 101 U. S., 204.

In *Bank* v. *Wentworth*, L. R., 5, Exch. Div., 96, 105, the court said that although the facts were such as to warrant the application of the rule of estoppel, it preferred to rest the case upon the rule, "that where one of two innocent parties," &c.

See also—

Weirick v. *Mahoning County Bank*, 16 O. S., 296.
Ins. Co. v. *Eshelmann*, 30 O. S., 647.
Burson v. *Huntington*, 21 Mich, 414.

Question of Agency.

In this connection I desire to call attention to the class

of cases which involve acts of mere agents as contradistinguished from acts of principals, and to which the act of the cashier in the case at bar is referable, if a question of agency must be forced into this discussion. I earnestly protest that such a question cannot properly arise here. The character of the power, in pursuance of which the act was done, absorbs the agent, and leaves nothing but the principal to consider. But for the sake of argument, and to show that I have not overlooked the cases of our adversaries, let me briefly refer to the classes of cases which must be decisive of the one at bar, if it should be thought to belong at all to the category of agency.

As between president and cashier of the defendant bank, the by-laws did not show to whom the custody of the stock certificate book and the corporate seal belonged. The course of business, however, was such, according to the evidence, as to show that those articles were in charge of the two officers in question, (Rec., pp. 34–5, as to books.) Those officers were not mere custodians; they were authorized to use the certificate book and the seal whenever in their judgment there was occasion for it. From what we have heretofore said and shown, it is apparent that confidence and trust were reposed in those officers in the highest degree. We have also shown, from the course of business, that the president was in the habit of surrendering his powers to the cashier. This was the necessary result of signing and turning the certificates over to the cashier of the bank. I insist that the effect of these acts, coupled with the cashier's right to hold and dispose of bank stock, was to give to the cashier the same rights and powers to bind the corporation, as an agent ordinarily has when armed with *a general letter of credit.*

The late Judge White, of the Ohio supreme court, in speaking of a non-negotiable instrument, to wit: A mere letter with the party's name to whom it was addressed signed in blank on the back of the letter, which was after-

wards fraudulently, if not criminally, used by the agent as against the owner whose name it thus bore; and after referring to it as a general letter of credit, said: "It is no defence against a *bona fide* holder to prove that the person to whom the paper was intrusted was only authorized to use it for a particular purpose; or that he was only authorized to fill a blank upon a certain condition which had not happened."

Weirich v. *Mahoning Co. B'k.*, 16 O. S., 296, 307.
See also—
Ross v. *Doland*, 29 O. S., 473–9.
Shryver v. *Hawkes*, 22 O. S., 308, 315.
1 *Par. on Notes and Bills*, 110, and see especially *Putnam* v. *Sullivan*, 4 Mass., 45.

Another class of cases, similar in principle to those just cited, can be found where parties have executed deeds to real estate, and placed them in escrow in the hands of persons with verbal or secret instructions of some kind to deliver them only upon certain specified conditions, and no being in possession of the property described in such deeds, have sought in vain to recover the property as against *bona fide* purchasers for value, on the ground that the persons in whose hands the deeds were placed in escrow, have fraudulently violated the conditions imposed.

Bailey v. *Crim*, 9 Bissel, C. C., 95.
Blight v. *Schenk*, 10 Pa. St., 285–6, 295–9.
Pratt v. *Holman*, 16 Vt., 530.
Penns v. *Arbuckle*, 22 Min., 417.
Millett v. *Parker*, Met. Ky., 608.

These cases are distinguishable from *Ogden* v. *Ogden*, 4 O. S., 182, relied upon by our adversaries, in this, that although the record is obscure in so far as it is reported in that case, it must be inferred, in order to reconcile the case with the current of authorities, and especially with *Weirick*

v. *Mahoning Co. Bk.*, cited *supra*, that the person delivering the deed in escrow was in fact in possession of the property described in the deed, so that such possession was of itself notice to the person claiming to be a *bona fide* purchaser for value without notice. It should therefore be read in connection with the other cases just cited.

There is still another class of cases similar in principle to those before cited, where bonds, such as indemnity bonds and the like, which of course, are in no sense negotiable instruments, were executed by the principal obligors respectively and their sureties, and, being apparently regular upon their face, have been given to the principal obligors by the sureties, with instructions to deliver such bonds only upon certain specified conditions, and the obligors and sureties alike have been nevertheless held bound by the bonds, though it was shown that the conditions imposed were broken.

Dair v. *U. S.*, 16 Wall., 1.
Russel v. *Freer*, 56 N. Y., 67.
State v. *Potter*, 63 Mo., 212.
State v. *Pepper*, 31 Ind., 76.
McCormick v. *Bay City*, 23 Mich., 457.
Nash v. *Fugate*, 24 Gratt., (Va.,) 202
Givin v. *Patterson*, 72 N. C., 189.
Insurance Co. v. *Brooks*, 51 Me., 506.
Canal and Banking Co. v. *Brown*, 4 La. Ann., 546.

We deem it wholly unnecessary in this Court to cite authorities to the proposition that corporations are liable for the frauds of their agents to the same extent that individuals are liable.

That the fraud of the cashier in this case, however, should be treated as the fraud of the bank is supported by many of the cases before cited; but I desire, in this connection, and looking at the subject as a mere question of agency, to call attention to *Barwick* v. *Eng. Joint Stock Bank*,

L. R., 2 Exch., 259, 265, where the subject is discussed in a masterly manner. See also the recent case of *Hackensack Water Co.* v. *DeKay*, 36 N. Y. Eq., 548.

Fisher v. *Beckwith*, 30 Wis., 55.

Merchants' Bank v. *State Bank*, *supra*, pp. 644–'5.

It will be urged, however, that the whole question of negligence is removed from this case, because intervening between it and the act of the cashier was either a crime or dishonest dealing. As to an alleged crime, the only claim will be that the act of the cashier was forgery under the Ohio statute.

The answer to this is two-fold: (1), that the act of the cashier was not forgery within the definition and meaning of that statute; and (2), that such a defence is untenable, when the crime is the act of an agent, as distinguished from a bailee or any other person in whom no power, trust, or confidence is reposed.

1. That such an act was not forgery under the Ohio statute, is expressly decided in—

Shryver v. *Hawks*, 22 O. S., 308.

Also see *Putnam* v. *Sullivan*, 4 Mass., 45.

State v. *Wilson*, 28 Minn., 52.

2. Is such a defence tenable when the crime or dishonest act is that of an agent, as distinguished from a bailee or any other person in whom no power, trust, or confidence is reposed?

The cases cited by our opponents do not support any such doctrine.

For example: In *Bank of Ireland* v. *Evans Charities*, Grace, the secretary, who used the seal of the trustees to commit a forgery, was its mere custodian. He had no power under any circumstances to use the seal for the purpose of attaching it to or executing any sort of an instrument. No one,

therefore, could have supposed that he had a right to affix or have been misled from his use of the seal.

Again, in *Baxendale* v. *Bennett*, the instrument which was used to the injury of the complainant was stolen from a drawer in its owner's office by one who had not even the custody of, much less any power or control over it.

In *Arnold* v. *Cheque B'k*, the paper was stolen from a letter-box by one who had nothing whatever to do with it.

In *Johnson* v. *Lyonais Credit Co.*, after the sale by the commission merchant to Johnson, the former had no power or authority over the tobacco, except that of a mere bailee or of a paid vendor, with the duty to keep the tobacco subject to the order of the purchaser to forward or deliver it.

In *Lehman* v. *R. R. Co.*, the party whom the railroad company permitted to fill up the bill of lading before its agent signed it, did nothing except to leave a portion of the space blank in the bill wherein the number of bales of cotton were to be, and in fact were, written. It gave him no authority to write anything in the bill. The bill did not purport to be incomplete, and, on the contrary, was filled out, and was a perfect instrument when it left the company's agent.

In *Swan* v. *North British Australasian Co.*, the broker induced the owner of the shares, by false representation, to execute the blank forms of transfer, and then actually stole the two which were fraudulently used. He had no custody of, or authority in respect to them.

In *Hall* v. *Rose Hill, &c., R. R. Co.*, (70 Ill., 673,) the secretary had no authority under any circumstances to issue the certificate in question. That power was only in the Board of Directors

These cases show that the line of demarkation should be drawn at the boundaries of agency, and that such a principle or rule should never be carried within them. Observe that I do not contend that this rule should not be applied to mere bailees, and to persons in whom no right or power has been vested in reference to the property which has been

made the instrumentality for injury, and therefore I am not at war with the class of cases in question. What I do contend for is this: That where one vests in another the custody of property or instruments, with power to do something in respect to them, and in the exercise of such power, *in the usual course of events*, the principal will be brought into legal relations with third persons generally, he thereby assumes a duty of care in favor of the public, and cannot excuse himself from the consequences of his own negligence merely because the agent has committed a crime or acted dishonestly. Obviously, in the cases just commented upon, legal relations with third parties were not in contemplation by the persons sought to be charged. Such relations were not the natural result of the acts from which liability was supposed to spring, and to charge them in such cases would overthrow the well known rules which furnish protection to those who store property for safe keeping, to those keeping property themselves and having it stolen from them, to those whose names are forged by persons in whom no confidence or power has been lodged, and to those who have made conditional sales of property without accompanying them with any right of disposition or otherwise, except the duty of paying the purchase money. But to apply the same rules to cases of agency where legal relations are not merely in contemplation, but also desired, would be to ignore the legal unity or identity of principal and agent, which is the foundation and reason for the maxims: "*Qui facit per alium, facit per se*," and "*Respondeat superior*."

It should be noted in passing that our adversaries also misapply the cases of *Horn* v. *Cole*, (51 N. H., 287,) *Wells* v. *Cook*, (16 O. S., 69,) and *Peek* v. *Gurney*, (L. R., 6, H. L., 377.) Their claim in respect to these cases is, that the action is for damages for false representation, and therefore an action of *deceit*. And further, that such an action "can only be maintained by the party to whom the representation is made." But the argument upon the

above citations ignores the fact that the representation in the case at bar was made *expressly and directly to the plaintiff*, consequently those cases are inapplicable for that reason. Besides, as shown at the beginning of this argument, the representation of a stock certificate is addressed to the world at large and accompanied by a corresponding duty in favor of the public.

The passage and case cited from Bigelow on Estoppel appear only in the first edition of the work. And we are advised by the learned author that these are omitted from the subsequent editions, because he conceived that the case represents a special class; and the statement in the text of the rule, as a general rule, was inaccurate.

V.

Turning now to our last general proposition, which concerns the cashier's ownership of stock in the bank at the time of this transaction in a larger amount than that now in controversy, it does seem to me that a mere statement of the facts is sufficient to establish error in the exclusion of Exhibit K, and in the withdrawal of the whole case from the jury. It was opposed to the decision rendered in this case.

104 U. S., 630.

See also *Bridgeport B'k* vs. *N. Y. & N. H. R. R. Co.*, 30 Conn., 270–2.

Schuyler's Case 34 N. Y., 84.

J. W. Warrington.

111-170

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 264.

ASENATH A. WARE ET AL., APPELLANTS,

vs.

THE GALVESTON CITY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED JULY 19, 1884.

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1 In the Circuit Court of the United States for the eastern district of Texas, in the fifth circuit, holding sessions at Galveston, March term, A. D. 1881—

Hon. AMOS MORRILL, judge, presiding.

ASENATH A. WARE and others, complainants,
vs.
THE GALVESTON CITY COMPANY, defendant. } No. 150. In Equity.

Be it remembered, that in the above-entitled and numbered cause, begun in the Circuit Court of the United States for the eastern district of Texas, in the fifth circuit, holding sessions at Galveston, by bill of complaint filed on the 11th day of October, A. D. 1880, wherein decree was rendered on the 4th day of March, A. D. 1881, the following proceedings were had, to wit:

2 *Bill of Complaint.*—Filed October 11th, 1880.

Circuit Court of the United States, 5th circuit, eastern district of Texas, at Galveston.

To the honorable the judges of said court, sitting in equity:

Asenath A. Ware, a *feme sole* and daughter of David White, dec'd; David P. Lumpkin, the son, only child, and heir-at-law of Mary Ann Lumpkin, dec'd, a daughter of David White, dec'd; David White; Mary Ann Holtzclaw, wife of James T. Holtzclaw, who joins his wife in this suit, and Thomas W. Coles—the said Mary A. Holtzclaw being and Thomas W. Coles being the children and sole heirs-at-law of Lucy S. Coles, dec'd, who was a daughter of said David White, dec'd, all of whom are residents of the county of Montgomery, state of Alabama, and citizens of the state of Alabama; and Daniel O. White and Clement B. White, residents of the county of Putnam, state of Florida, and citizens of the state of Florida, and who are the sons and heirs-at-law of J. Osborn White, dec'd, a son of David White, deceased—the said parties being the descendants as aforesaid and only heirs-at-law of the said David White, dec'd, bring this their bill against the Galveston City Company, a corporation incorporated under an act of Congress of the republic of Texas, and a citizen of the state of Texas, and whose office and place of
3 business is in the city and county of Galveston, state of Texas.

And thereupon your orators complain *an* say:

1. The republic of Texas, by act of Congress approved 9th December, 1836, for and in consideration of fifty thousand dollars, granted to Michael B. Menard and his associates one league and labor of land on and including the east end of Galveston island, and on 25 January, 1838, in pursuance of the terms of said grant, a patent therefor was issued to said Menard.

2. At the time of said grant the aforesaid David White agree to pay for said Menard *for* said sum of fifty thousand dollars, and became responsible for and obligated to pay the same.

3. David White and his estate have paid the whole of said fifty thousand dollars to the republic of Texas.

4. At the time of the grant of the said land, on or about Dec. 10, 1836, Menard executed in writing and delivered to White a mortgage on the land to secure repayment of said purchase money.

5. At date of said grant of the land there were certain other persons associated with Menard and interested in the purchase, and other persons became thereafter interested therein also, as co-associates of said M. B. Menard.

6. Menard and his associates were copartners associated
4 with a view of organizing a formal joint stock company for the sale of the land, for profit, in lots, and distribution of net proceeds as dividends to shareholders.

7. Menard and his co-associates did organize themselves into a formal joint stock company, which was afterwards duly incorparated and is the defendant.

8. At the date of the purchase of the land, and thereafter until on or about the 18th day of April, 1837, M. B. Menard was the acting managing partner, transacting all business for the promotion of said company in his own name, and as such managing partner held the legal title to the land in his own name, and in his own name incurred the indebtedness aforesaid to David White, on behalf of the partnership, and in his own name executed the mortgage on the land.

9. Thereafter, on or about April 18, 1837, Menard, for the interest of himself and associates and advancement and promotion of the company, the defendant, compromised a conflicting title to part of the league and labor of land, and released to one Triplett 640 acres thereof, and the balance of the land he transferred by formal written conveyance to Levi Jones, one of his associates, in trust for the Galveston City Company, for its organization and promotion.

5 10. Part of the expressed consideration of transfer of the title to the land from the trustee and managing partner to the trustee and co-associate Jones, as aforesaid, was that out of the first proceeds of sale of stock to be issued by him to amount of the value of the land he should pay the amount due David White for the release of the land from the mortgage and acqitance of Menard.

11. In the compromise of Menard with Triplett, Menard retained for himself and co-associates a certain proportionate interest in said 640 acres of land, and under said agreement in writing the title to said 640 acres was duly transferred by Menard and by Triplett to Levi Jones, Wm. R. Johnson, and Thomas Green, to be held by them in trust to issue stock to value of the land, and to sell the stock for benefit of Triplett & those interested with him, and of Menard and his co-associates.

12. Thereafter, on or about 15th day of June, 1837, still acting as managing partner, & in furtherance of the interests of himself and associates, M. B. Menard, to avoid conflict and complication of there being one stock company for the 640 acres held by Green, Jones, & Johnson, and another by stock issued for the remainder of the

land by Jones, did further enter into a formal agreement in writing with Triplett, Levi Jones, William R. Johnson, & Thos.
6 Green, whereby Jones, Green, and Johnson were to hold the whole of said league and labor of land in trust and issue 1000 shares of stock to represent its value, of which 200 shares should represent the proportionate interest of Triplett and those interested with him, and the other 800 should represent the interest of Menard and his co-associates.

13. That of the 1000 shares, certificates for 400 should be set aside to provide for and take up & in lieu of certain certificates that had been issued under the Menard interest.

14. The remaining 600 shares were to be sold and the proceeds applied first to expenses of the trust or commission, and of the balance, $\frac{1}{3}$ should be paid to Triplett and those claiming under him, and $\frac{2}{3}$ to Menard and his associates.

15. It was, however, expressly agreed that there should be no liability on the part of Triplett and those he represented for the fifty thousand dollars due to David White as aforesaid, and that amount, or so much thereof as remained unpaid, should be paid David White out of the first net proceeds of sales, and that the trustees or commissioners should make no payment to Menard and his associates until they paid to the Triplett interest a proportionate amount, that is to say, $\frac{1}{3}$ of $50,000, and if the net proceeds of sales of shares should not be sufficient to pay the amount due White and *and* an
7 amount equal to $\frac{1}{3}$ thereof to the Triplett interest, then Menard's interest was to make good the deficiency to the Triplett interest.

16. The agreement further provided that Menard and his associates and the Triplett interest might take shares and have certificates issued therefor by the trustees to the amount of their respective interests.

17. That when said trustees or commissioners thought sufficient stock had been disposed of, a stockholders' meeting was to be called, and at this meeting Menard was to represent all of the 400 shares aforesaid undisposed of and $\frac{2}{3}$ of the unsold portion of the 600 shares, and the other $\frac{1}{3}$ was to be represented by Triplett.

18. The agreement also provided for transfers of stock by assignment in writing of the certificate, before a notary public or magistrate, and in the presence of two witnesses.

19. Any two of said three trustees or commissioners were authorized to act. The trustees were to hold the title to the land subject to orders of shareholders adopted at stockholders' meeting.

20. Said trustees issued the 1000 shares of stock and executed certificates therefor, as hereinafter fully shown.

21. The shares so issued is the stock the holders of which were incorporated and is the defendant.

8 22. Jones, Green, and Johnson, trustees and commissioners, under supervision of Menard, and with his assistance, made every effort to sell the 600 shares of stock; but, finding it im-

possible to sell, they put aside and reserved such a number of the shares from the proportionate number belonging to Menard and his original associates, and with their approval, to be held by the company itself, as were deemed a sufficient provision, appropriation, and trust in the hands of the company itself, from the proceeds of which the company could and should pay the amount due David White, with which the land, the capital of the company, stood charged, and to the end that by this provision Triplett and those claiming under him should be protected and secured from any danger of being charged with any part of said amount; and that their proportionate number of the shares of the stock should be free of the amount due from Menard and his co-associates. This provision of stock for the payment of White was to the further end of protecting M. B. Menard from any individual liability by reason of his having incurred the indebtedness in his own name for the benefit and account of his associates as aforesaid.

9 23. The balance of the proportionate interest of Menard and his associates in said stock was duly turned over and delivered to them as owners thereof, and the proportionate $\frac{1}{3}$ or 200 shares were turned over to and received by Triplett and those in interest with him, and received by them, all their full interest under said agreement.

24. At the time of issuance of the 400 shares set aside by said agreement as part of the proportionate interest of Menard and his associates, and to take up stock interests previously issued on their behalf, there had been sold about 33 shares, and the balance disposed of had been taken by Menard's original co-associates on account of their respective personal interests as such associates.

25. The original association or partnership holding the league and labor of land with Menard, and in his name, consisted of Menard and nine co-associates.

26. After providing for the payment of the amount due on the land by placing part of the stock belonging to Menard and his original co-associates in the hands of the company for that purpose, and after paying or providing for payment of the expenses of promotion and organization, Menard and his associates had left 600 shares of stock, of which 60 shares were given to and received in full as

10 the net 1-10 belonging to each of the original members.

27. Plaintiffs are not advised as to what number of the other 200 shares making the 800, the gross interest of Menard and his associates, were set aside for and placed in the hands of the company by said trustees and with consent of Menard and his associates as aforesaid, to pay the amount due David White, and to free the capital, the land, and the Triplet interest from any lien or liability. But plaintiffs are advised, as more fully alleged hereafter, that this defendant on 10th day of March, 1851, had remaining in its hands and belonging to it for said purpose 29 shares of the number so appropriated.

28. On the 13th of April, 1838, for the more formal management

of the affairs of the company, the defendant, and in pursuance of the provisions of said agreement, the stockholders elected 5 directors of the company, who of their number elected M. B. Menard president.

Said stockholders' meeting instructed the directory of the company to request a conveyance and transfer of the title to the league and labor of land, the sole capital of the company, to them as directors, from the trustees or commissioners, Jones, Green & Johnson.

29. On 31st of December, 1838, said directory, in the course of the management of the affairs of the company and in order to
11 keep proper books of transfers of stock, ordered the trustee certificates to be called in, and issued in lieu thereof new or as then called "renewal certificates," to represent the shares of the company, on surrender of the trustee certificates.

30. Said renewal certificates were from time to time before and after incorporation of this defendant given in lieu of and cancelled all the trustee certificates, except for about 10 shares which have never been presented to the company for renewal; that these renewal certificates are the certificates which now represent the shares of the stock in the Galveston City Company, the defendant, and there has been no other or further change of form of certificates representing the stock.

31. Thereafter, on or about the 12th day of April, 1839, the said trustees or commissioners, Levi Jones and Wm. R. Johnson, in pursuance of the wishes and directions of the stockholders as aforesaid, and in accordance with the terms of conveyance to them, made conveyance or transfer in writing of the title to the league and labor of land, in them as trustees, to M. B. Menard, Thos. F. McKinney, Moseley Baker, William Hardin, and James Love, as the directors of the Galveston City Company.

32. All said directors, except James Love, were of the original associates of Menard.

12 33. On or about or prior to the 7th day of November, 1838, the Galveston City Company, the defendant, through its agent therefor, M. B. Menard, who was also at that time president of the company, but in his (Menard's) individual name, paid David White $25,000 on said sum of $50,000, out of proceeds of stock of the Galveston City Company sold, belonging to the company for that purpose, as aforesaid.

34. The Galveston City Company did then or prior to 7th Nov'r, 1838, intrust M. B. Menard, as agent for said company, with 50 shares of its capital stock belonging to the company in trust, as part of the stock given to the company by Menard, and those representing the interest of his original nine co-associates to protect the interest of Triplett and those holding under him, and for the protection and payment of the sum due David White, and by such payment to release said land, the capital of the company, from the lien thereon iven to secure said sum.

35. The agency of Menard was to sell the fifty shares for the company, and to pay David White the balance due him.

36. The Galveston City Company then believed that the fifty shares would sell for enough to pay White the balance due him.

37. Menard realized from 21 of the 50 shares the sum of
13 $10,550, and paid the same on or about the year 1839, for said company, but in his (Menard's) own name, to David White; said payments of $25,000 and $10,550, aggregating $35,550 so paid by the defendant through its agent, Menard, is all that has ever been paid on the sum due David White, and there remains due and unpaid of the original $50,000 the amount of $14,450 of principal.

38. On the 10th day of December, 1841, David White died.

39. On the 5th day of February, 1841, the stockholders of the joint stock incorporated Galveston City Company were incorporated under same name and style by act of congress of the republic of Texas and became the corporation the defendant.

40. On the 10th day of March, 1851, M. B. Menard made a written report to the defendant as to his agency for the sale of said 50 shares of the capital stock for the amount due White's estate; Menard styles said report a memorial, and in it reviews the history of the company, the defendant, as connected with the incurring the liability to White, and recites in brief and substantially:

The purchase in 1836 by himself and his associates of the league and labor of land; that David White became the acceptor of
14 him (Menard) for $50,000, the purchase money thereof; that he (Menard) was acting as manager for the company, the defendant, then being formed, and his liability to White for said amount was incurred for the company; that the company had paid through him $35,550, realized from stock of the company belonging to the company, and in his (Menard's) hands for that purpose; that without calculating interest there remained a balance due the estate of David White, dec'd, of $14,450; that after the payment in 1838 or 1839 of $25,000 by the company, through him, the Galveston City Company further intrusted him with 50 shares of the stock of the company belonging to the company for payment of said amount due White, which was then thought amply sufficient to cover the principal of the balance then due.

That in the year 1839 he (Menard) had realized from proceeds of 21 shares of the 50 the sum of $10,550, and had paid the same on said debt.; that owing to the badness of the times and depreciation of real estate and stock representing real estate, he had not been able to do any better; that he (Menard) was being sued individually by estate of David White, sr., the sum due of $14,450; that he (Menard) had in his hands 29 shares of said 50 of the stock of the company belonging to the company of the then market value of $5,800
15 in the aggregate, which would leave a deficiency of $8,650 on the $14,450 of the principal of the amount due White's estate without calculating interest; that he (Menard) did not then

set up any claim for interest which might have to be paid, nor for the expenses, trouble and responsibility that he (Menard) had incurred; Menard by said report then suggests and asks that the defendant, his principal, make provision for the payment of the deficiency he estimates will occur as aforesaid, and that such provision be made by a par credit on the books of the company to the estimated amount of this probable deficiency, and for *for* the amount of $13,000 paid by him (Menard) out of his own means to one Johnson for the use and benefit of the Galveston City Company, making a total of $21,650.

41. On or about the 10th day of March, 1851, the board of directors of the defendant having read and considered the memorial or report of M. B. Menard, ordered by resolution, and in substance and effect approved, acknowledged and allowed, the report and accounts of its said agent, Menard, as to the amounts hereinbefore stated at being given in said report, and made provision for said esti-
16 mated deficiency which might occur as aforesaid on sale of said 29 shares of stock, and ordered a credit to said Menard for said total amount of $21,650 to be entered on the books of the company, and the said resolution of defendant by its directory further tendered thanks to said Menard, and expressed its desire to show by its resolution its appreciation of the services which as agent of the company he had rendered the Galveston City Company.

42. Plaintiffs further allege that there has been no other or further payment made on the amount due estate of David White as shown in said report; the said balance of the principal of said amount, the sum of $14,450 and interest thereon, is due and wholly unpaid.

43. Said 29 shares of stock held by the defendant in the hands of Menard as its agent, on the 10th day of March, 1851, is part of the stock placed in the hands of the company by Menard and his original associates, for the proceeds to be applied to payment of said lien to White and for the protection of other stockholders as aforesaid against said lien.

44. These 29 shares have never been applied by the defendant, or by any one for it, to payment of the balance due on the amount due David White aforesaid.

45. These 29 shares of stock are now of a sufficient market
17 value in the aggregate to pay said amount of $14,450 and interest thereon.

46. M. B. Menard died on the —— day of ———, 1856, and his estate is insolvent.

47. Plaintiffs further allege that neither the legal representatives nor the heirs of David White, deceased, had, on the 10th day of March, 1851, or at any time since, until within two years last past, any information, knowledge, or notice of said report or memorial of M. B. Menard to the defendant, or of the action of the defendant thereon recognizing itself as principal and ratify the acts and agency of Menard in the premises, and recognizing and promising to pay the balance due the estate of David White, dec'd, as aforesaid, and

recognizing, ratifying, and confirming the appropriation of said 29 shares of stock, to be held by the defendant, and at that date in the hands of its agent, Menard, (who was at that time also one of the directory of the defendant,) for the payment of said amount and as a provision for satisfaction of former liens.

48. A few days after the 10th day of March, 1851, on or about 20th May, 1851, the suit aforesaid, which is referred to by Menard in his report as pending against him individually on said bal-
18 lance due, was dismissed on motion of the said defendant, M. B. Menard, from the docket of the District Court of Harris county, state of Texas, for want of prosecution.

49. That neither M. B. Menard, then agent as aforesaid and also a director of the Galveston City Company, nor said company, had at any time in any way, either directly or indirectly, given the representatives or heirs of David White, then dec'd, any notification or notice of said memorial of Menard, or the action of this defendant thereon, or that on said 10th of March, 1851, or at any time thereafter, there was a recognition of and a promise by defendant to pay the amount due, and a provision of 29 shares held by the defendant therefor, as aforesaid.

50. That neither the representatives or heirs of David White have been negligent or wanting in diligence in not knowing until within two years last past of Menard's memorial and the action of defendant thereon, or the matters and things therein referred to. The heirs and representatives of estate of David White, dec'd, had no notice of any kind that would put them on enquiry in the premises.

51. On the employment by plaintiffs of their present solicitors, Mann & Baker, within two years last past, to represent another and different cause of action against the defendant herein, they were then advised by their solicitors aforesaid, & for the first time, that in a suit brought by Mann & Baker for other parties against the Gal-
19 veston City Company, the defendant had produced in the evidence on the trial a copy of said memorial and the action of the defendant thereon; that upon being so advised plaintiffs did forthwith, on or about 26th day of January, 1880, make formal demand in writing on defendant for pay of said $14,450 and interest thereon, and request a statement as to what other and further action had been taken in the premises by the defendant subsequent to the 10th of March, 1851. That said demand and request was duly presented to the defendant at a meeting of its directory. That defendant has never given plaintiffs any answer thereto.

52. Plaintiffs allege that on 10th day of March, 1851, when Menard, the agent & a director of defendant, was by his said report or memorial unqualifiedly acknowledging the justness and correctness of *of* the amount and of his then liability therefor, by reason of his having acted in his own name in contracting the same, though in truth and in fact it was due from & by the Galveston City Company, as his undisclosed principal, and then & after defendant had ratified and promised to pay its liability incurred by Menard, and acknowl-

edged holding as provision made for the payment the 29 shares of stock as aforesaid; that at the same time and for six years
20 prior thereto, while Menard was president of the company, the defendant and agent therefor, for *for* the purpose of disposing of said 29 shares of stock & the payment of the ballance due David White's estate, and up to and inclusive of the time of having said suit dismissed as aforesaid, Menard had been and was by his pleadings defending said suit on various pretexts, among others that the demand and the mortgage on the land to secure the same were barred by the statute of limitations.

53. At the time of the dismissal of said suit there was nothing in the pleadings of Menard in any manner showing that the defendant was originally bound for said amount, or any recognition or ratification of said amount by the defendant, or that the defendant held stock to meet the amount due, or that he and his associates had ever placed said stock in the hands of defendant to pay said amount and to satisfy the mortgage.

54. Plaintiffs allege that the existence of said memorial and defendant's action thereon as aforesaid was never known by any one but the defendant, its officers and agents, until produced on trial of a cause to which plaintiffs were not parties by defendant as
21 aforesaid; that so far from its being known, that to the contrary the defendant has at all times studiously concealed this matter and all its affairs even from its own stockholders, and did on or about the 21st day of April, 1858, pass, in pursuance of such policy, an order prohibiting any one, even its own officers, from inspecting the books of the company except in the presence of the board of directors.

55. Plaintiffs further allege that they and the legal representatives of estate of David White until administration was closed have had other and different claims against the defendant as heirs of David White, and at divers times, from 10th March, 1851, to January 31, 1880, made request of the company to be allowed to examine its books, which said requests have been at all times refused; and in all plaintiffs' communications with and demands on the defendant and its officers as aforesaid, they have never given plaintiffs any intimation of plaintiffs' rights growing out of said sum being original due by & from them as principals of Menard, or of their so admitting and recognizing and ratifying on 10th March, 1851, but, on the contrary, have at all times concealed that petitioners had or ever had any rights or grounds for suit against this defendant.

22 56. Plaintiffs further allege that the defendant has at all times since its incorporation in 1841 claimed that it took its title to said league and labor of land, its capital, by conveyance from the republic of Texas by the original grant to Menard and the patent thereunder, dated Jan'y 25th, 1838, and by absolute warranty deed from Menard to the corporation the defendant, of date of 1st day of January, 1842; and defendant has never claimed title through or in any manner given plaintiffs or the public notice of the

true chain of title to said land by and through the conveyance by Menard to Levi Jones of April 18, 1837, hereinbefore more fully described; and the conveyance of Menard and Triplett to Levi Jones, Thos. Green, and Wm. R. Johnson of same date; and conveyance of Menard and Triplett to said Green, Jones & Johnson of June 15, 1837; and conveyance by said Jones & Johnson to the directors of the Galveston City Company of April 12th, 1839, all of which have been hereinbefore more fully described, and which are in the possession of defendant.

57. By reason of said claim of title of defendant by and through a chain of title other and different from that which in truth and in fact placed the title to the land in said company, plaintiffs have not known or been put upon any notice of the several provisions
23 made as aforesaid in said transfers of said real chain of title for the protection of the rights of petitioners and the payment or securing payment of the amount due as aforesaid.

58. Defendants have been continuously claiming title through said absolute deed from Menard, as purchasers, at *at* time when Menard was alleging and claiming in the courts of Texas by his pleadings in suit in Dist. Court of Harris county aforesaid that all rights of petitioners and lien on the land were barred by statute of limitation.

59. Plaintiffs were not advised of and knew nothing of said instruments which constitute the real chain of defendant's title to the land until on or about the 1st January, 1880, when they chanced to come into the possession and knowledge of these facts through Mann & Baker, when then in other matters against the defendant, and said Mann & Baker, att'ys at law, became cognizant of these facts through the suit as aforesaid, apprised them of said memorial.

60. Plaintiffs further allege that their ancestor, David White, in his lifetime, and plaintiffs, his heirs, have at and since the origin of the claim herein set up been residents and citizens of the
24 states of Alabama and Florida, respectively, and remote from and inaccessible to the original republic of Texas and the now state of Texas.

61. M. B. Menard was continuously president of the defendant from the election of the first board of directors in April, 1838, to June 26th, 1841, and continuously a director from said election of the first board until his death in the year 1856.

62. W. B. Lipscomb, who brought the suit against M. B. Menard on the balance due estate of David White, as hereinbefore set out, was administrator of estate of David White solely for the purpose of bringing that suit.

63. Plaintiffs further allege that the Galveston City Company, the defendant, still owns and holds a large portion of the said league and labor of land by title as aforesaid; that of said land remaining in possession of said defendant and owned by it as aforesaid, a part is known and described as follows, according to the map and plan of said defendant's land, block No. 5:

Blocks 42 to 56 inclusive.
Do. 103 to 116 do.
Do. 163 to 176 do.
Do. 224 to 241 do.
Do. 282 to 296 do.
Do. 343 to 400 do.
Do. 403 to 416 do.
Do. 456 to 536 do.
25 Do. 577 to 596 do.
Do. 641 to 666 do.
Do. 701 to 730 do.

All within the city and county of Galveston, state of Texas.

64. The value of the part of the league and labor of land remaining in possession of the defendant, and its now capital, exceeds $500,000.

65. The policy and plan of operation of defendant for many years past has been to sell its lands for its stock.

66. The defendant has cancelled the stock of the company by sale of lands therefor until there only remain fifty shares, or thereabouts, of the original 1,000 shares, and of these fifty shares 10 are those which have never been heard from by the defendant since the certificates were issued therefor by Green, Jones, & Johnson, trustees, and these certificates have never been presented for renewal certificates of the form in use; and these certificates are believed by defendant to be lost, and defendant does not now know who owns them.

67. That John L. Darragh is the president and James P. Cole the secretary of defendant, and they are both residents of the city and county of Galveston, state of Texas.

67. Plaintiffs waive and dispense with oath to defendant's answer to this bill.

26 1. Plaintiffs pray a decree ordering an account to ascertain amount of principal and interest due them from defendant.

2. That amount due be decreed to be a lien on the land now held by the defendant.

3. That 29 shares of stock of the defendant came into custody and control of defendant to be sold for payment of amount due plaintiffs. That defendant sell said stock forthwith, and from proceeds thereof, within 60 days from the date of the decree, pay the amount due plaintiffs and if it be that by their own fault defendant has not the stock still in its custody and is unable to perform this duty and decree, that the defendant be decreed to forthwith pay the amount due to plaintiffs.

4. That if the amount due plaintiffs has not been paid within 60 days from date of the decree, that defendant be required to sell for cash, at public sale, within thirty days thereafter, sufficient of the land to satisfy the lien thereon, the amount due plaintiffs.

5. Plaintiffs pray such other and further relief as the nature of this case may require and to your honors seem meet.

6th. Plaintiffs pray this honorable court to issue a writ of subpœna

in due form, according to the rules of this court, to be directed to the Galveston City Company, a corporation by the law of
27 Texas, at Galveston, commanding them on a certain day and under a certain penalty to be and appear before the honorable this court, to stand to, abide, and perform such order and decree therein as to this court shall seem meet and shall be agreeable to equity and good conscience.

M. C. McLEMORE,
MANN & BAKER,
GRESHAM & JONES,
Solicitors for Plaintiff.

The foregoing endorsed as follows, to wit:

No. 150, equity; Asenath A. Ware, David P. Lumpkin, David O. White et al., *vs.* The Galveston City Company. Bill in equity; filed Oct. 11th, 1880. C. Dart, clerk.

28 *Subpœna.*—Issued October 11th, 1880.

UNITED STATES OF AMERICA,
Circuit Court, fifth circuit and eastern district of Texas.

The President of the United States of America to the Galveston City Company, greeting:

You are hereby commanded to appear personally before the honorable Circuit Court of the United States for the eastern district of Texas, in the fifth circuit, at a court to be holden at the city of Galveston, in and for said circuit, on the first Monday of November next, or whensoever the said court shall be there, to answer a bill exhibited against you by Asenath A. Ware, a feme sole, a daughter of David White, dec'd; David P. Lumpkin, the son, only child and heir-at-law of Mary Ann Lumpkin, dec'd, a daughter of said David White, dec'd; David White, Mary Ann Holtzclaw, and her husband, James T. Holtzclaw; Daniel O. White and Clement B. White and Thomas W. Coles, and to do further and receive what the said court shall have considered in that behalf. And this that you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Honorable Morrison R. Waite, chief justice of the Supreme Court of the United States, and the seal of the Circuit Court of the United States for the eastern district of Texas, at the city of Galveston, this 11th day of Oct., eighteen hundred and eighty, and of the Independence of the United States of America the 105th year.

[SEAL.] C. DART,
Clerk U. S. Circuit Court, eastern district of Texas, at Galveston.

The defendant, the Galveston City Company, is required to enter its appearance in the above suit in the clerk's office on or before the

first Monday of November next, otherwise the bill will be taken as confessed.

C. DART,
Clerk U. S. Circuit Court, eastern district of Texas, at Galveston.

29 *Marshal's Return.*

Received this writ on the 11th day of October, 1880, and I executed the same on the same day of October, 1880, by delivering to the within named defendant, the Galveston City Company, through its president, J. L. Darragh, in person, in the city of Galveston, a copy of this writ certified by the clerk of this court.

WM. J. PHILLIPS,
U. S. Marshal,
By W. T. CLAYTON,
Deputy.

The foregoing subpœna endorsed as follows, to wit:

Ch. No. 150; Asenath A. Ware et al. *vs.* The Galveston City Company; subpœna in chancery; issued Oct. 11th, 1880; returnable Nov. Rules, 1880; C. Dart, clerk; returned and filed 11th day of Oct., A. D. 1880; C. Dart, clerk.

30 *Defendant's Entry of Appearance.*—Filed November 8th, 1880.

In the Circuit Court of the United States, eastern district of Texas, at Galveston.

ASENATH A. WARE & others, complainants,
vs.
THE GALVESTON CITY COMPANY, defendant.
} In equity, No. 150.

The defendant, The Galveston City Company, enters its appearance by its counsel in the above cause, and the clerk will duly enter same.
At Rules, Nov. 1, 1880.

BALLINGER & MOTT,
W. H. GODDARD,
Counsel for Defendant.

The foregoing endorsed as follows, to wit:

Chancery No. 150; Asenath A. Ware & others, complainants, *vs.* The Galveston City Company; defendant's entry of appearance; filed Nov. 1, 1880; C. Dart, clerk; Ballinger & Mott, W. H. Goddard, counsel for de'ft.

31 *Appearance.*—From Rules, November Rules, November 1st 1880.

In the Circuit Court of the United States, eastern district of Texas, at Galveston.

ASENATH A. WARE and others, complainants,
vs.
THE GALVESTON CITY COMPANY, defendant. } In equity. No. 150.

The defendant, The Galveston City Company, enters its appearance by its counsel in the above cause, and the clerk will duly enter same.

At Rules, Nov. 1, 1880.

(Signed) BALLINGER & MOTT,
W. H. GODDARD,
Counsel for Defendants.

Entered Monday, Nov. 1, 1880.
Attest: C. DART,
Clerk U. S. Circ't Court, E. D. T., G.

Demurrer.—Filed December 6th, 1880.

In the Circuit Court of the United States for the eastern district of Texas. In equity.

ASENATH A. WARE and others, plaintiffs,
vs.
THE GALVESTON CITY COMPANY, defendant. } Ch. 150.

The demurrer of the Galveston City Company, defendant, to the bill of complaint of Asenath A. Ware and others:

32 This defendant, by protestation, not confessing all or any of the matters and things in plaintiffs' bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth that—

I. That it does not state any case entitling it to relief against defendant.

II. That it does not contain any matter of equity whereon this court can ground any decree, or give to the plaintiffs any relief against this defendant.

III. That it does not show right under David White in the plaintiffs; does not show intestacy, administration proceedings, or legal rights of plaintiffs to the pretended claim sued for.

IV. That it does not show any liability or indebtedness of defendant to plaintiffs, or any ground of action herein.

V. That the plaintiffs' cause of action is barred by the limitation laws of this state.

VI. That the plaintiffs' cause of action accrued more than forty years ago, and is stale and barred by laches, and answer thereto should not now be demanded.

VII. That plaintiffs allege facts showing or implying knowledge of conveyance by Menard to trustees for forming the Galveston City Company in 1837, or about that year, and possession
33 and control of said league and labor of land thereafterwards by or under said trustees; that David White was then the mortgagee of said premises; that he was a large stockholder in said company, and plaintiffs cannot impute ignorance, or want of notice, or the means of notice, on the part of said White and those claiming under him, as to the nature of the title of said trustees or of conveyance from Menard.

VIII. That the petition shows no facts to excuse the laches of plaintiffs and those under whom they claim prior to said alleged memorial nor subsequent thereto, no inquiry having any relation to the subject-matter of this suit until long after said pretended claim against Menard and this company was stale and barred by limitation.

IX. That the alleged facts of demand for examination of defendant's books do not excuse laches and delay and non-claim herein.

X. That no diligence is shown as respects M. B. Menard, and no facts explaining the action of plaintiffs & those under whom they claim respecting said Menard, and no equity exists to entitle plaintiffs to make demand against defendant after this great lapse
34 of time, without explanation or statement of proceedings or action as to said Menard.

XI. The allegations in the petition that R. J. Ware, executor of David White, deceased, paid to the republic of Texas the whole sum of fifty thousand dollars before 1851, said payment being a fact on which the entire claim and equity of plaintiffs depend, are general, vague, and indefinite, without specifications or particulars as to time, manner, or facts.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur to the said bill, and to all matters & things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with reasonable costs in this behalf sustained.

BALLINGER & MOTT,
Counsel for Defendant.

I certify that in my opinion the foregoing demurrer of the Galveston City Company, defendant, to the bill of complaint in this cause is well founded in law and proper to be filed in the above cause.

M. F. MOTT,
Solicitor and of Counsel for Defendant.

35 UNITED STATES OF AMERICA, }
Eastern district of Texas. }

J. P. Cole, agent Galveston City Company, being duly sworn, doth depose and say that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

J. P. COLE,
Agent Gal. City Co.

Subscribed & sworn to before me this the 6th day of December, A. D. 1880.

C. DART,
Clerk U. S. C. Ct., E. D. T., G.
[SEAL.] By JAMES T. SPANN,
Dep'ty.

The foregoing demurrer endorsed thus:

Ch. 150; Asenath A. Ware and others *vs.* The Galveston City Company; demurrer; filed Dec'r 6th, 1880; C. Dart, clerk; by James T. Spann, dep'ty; Ballinger & Mott, for def't.

36 *Demurrer Set for Hearing.*—Filed December 6th, 1880.

Circuit Court of the United States, eastern district of Texas, at Galveston.

ASENATH A. WARE et al. }
vs. } S. S. Eq. No. 150.
THE GALVESTON CITY CO. }

Now come plaintiffs at this December rule day, the 1st Monday in December, 1880, and at rules set down demurrer of defendant filed this day to plaintiffs' bill for argument, on Friday, the 17th day of December, before the Hon. Amos Morrill, in his chambers at the court-house of the United States circuit court at Galveston, in the eastern district of Texas, at 10 o'clock a. m. And the clerk of said court will forthwith have a copy of this setting served on Messrs. Ballinger & Mott, counsel for defendants, resident at Galveston aforesaid.

MANN & BAKER,
Of Counsel for Plaintiffs.

The foregoing endorsed as follows:

Ch. 150; Asenath A. Ware et als. *vs.* Galveston City Company; setting down of demurrer for argument; filed Dec. 6, '80; C. Dart, clerk; by James T. Spann, dept.; Mann & Baker, of counsel for pl'ffs; issued writ to serve Dec. 6, '80.

37 *From Rules, December Rules, December 6th*, 1880.

In the Circuit Court of the United States, eastern district of Texas, at Galveston.

ASENATH A. WARE & others, complainants,
vs.
THE GALVESTON CITY COMPANY, defendant. } In Equity. No. 150.

This day came the plaintiffs herein and sets the defendant's demurrer, filed this day, down for hearing on Friday, the 17th day of December, A. D. 1880.

Attest:

C. DART,
Clerk U. S. Circ't C't, E. D. T., G.
By JAMES T. SPANN, *Dep'ty.*

Dec'r 6th, 1880.

Writ to Serve Copy, etc.—Issued Dec'r 6th, 1880.

In the Circuit Court of the United States for the eastern district of Texas, at Galveston, Texas.

ASSENATH A. WARE et al.
vs.
THE GALVESTON CITY COMPANY. } No. 150. Ch.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

38 You are hereby commanded to serve the Galveston City Company, defendants in the above entitled and numbered cause, or their attorneys of record, Messrs. Ballinger & Mott, with the accompanying certified copy of the setting down of demurrer for argument therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said Circuit Court of the United States for the eastern district of Texas, at Galveston, this the 6th day of December, A. D. 1880.

[SEAL.]

C. DART,
Clerk U. S. Circ't C't, E. D. T., G.
By JAMES T. SPANN, *Dep't.*

Marshal's Return.

Rec'd this writ the 7th day of Dec'r, 1880, and executed the same day, 7th Dec'r, 1880, by delivering a certified copy of the within named setting down demurrer to defendant's attorneys, Mess. Ballinger & Mott, in Galveston.

W. J. PHILLIPS,
U. S. Marshal,
Per B. M. PHILLIPS,
Deputy.

The foregoing writ endorsed this:

No. 150 Ch.; Asenath A. Ware et al. *v.* The Galveston City Company; writ to serve copy of setting down demurrer for argument; issued Dec. 6, 1880; returned and filed Dec'r 8, 1880; C. Dart, clerk.

39 *Further Assignment of Grounds of Demurrer.*—Filed December 29th, 1880.

U. S. Circuit Court, Galveston.

ASENATH A. WARE & others
vs.
THE GALVESTON CITY COMPANY. } In Equity.

Defendants set down more specifically as grounds of demurrer, in addition to those heretofore assigned, the following:

(A.) That the bill does not show any liability on the part of the defendant to complainants.

(B.) That the bill does not show that the Galveston City Company ever became or is liable for the debt of Menard to White.

(C.) That the allegations of principal liability of the defendant are without any facts to sustain them.

(D.) That the alleged memorial by Menard to the City Company, and action of the company thereon, so far as same consists of facts and not of arguments and deductions by complainants, show no liability on the part of the company to complainants.

(E.) The facts were not such as constituted any acknowledgement of or new promise to pay a debt shown to be then barred by limitation.

(F.) The same was without any new or further consideration.

(F 2.) No averment that it was signed by the party to be charged therewith.

(G.) The board of directors could not revive a debt against
40 the corporation, the defendant.

(H.) No acknowledgment or promise was made to the complainants, or any of them, or any agent of theirs, nor was the same in any manner accepted or acted upon by complainants, nor in any manner influenced action of complainants, and was without any privity of complainants.

(I.) The heirs or representatives of Menard are necessary parties.

(J.) The associates of Menard, their heirs or representatives, alleged to be interested in the stock, are necessary parties.

(K.) No excuse is made for the laches up to March, 1851, nor any excuse for the laches thereafter, but the bill shows complainants' rights to be barred by the laws of limitation and by laches, and to be a stale demand.

BALLINGER & MOTT & GODDARD,
Of Counsel for Defendant.

The foregoing instrument endorsed thus:

Ch. 150; Asenath A. Ware & others *vs.* The Galveston City Company; further assignment of grounds of demurrer; filed Dec'r 29, 1880; C. Dart, clerk; Ballinger & Mott, for def't.

41 *From Minutes November Term, December* 29, 1880.

ASENATH A. WARE et al.
vs.
THE GALVESTON CITY COMPANY. } Ch. 150.

This day came the complainants by their solicitors, and the defendant appearing by its solicitors, thereupon came on to be heard the defendant's demurrer to the complainants' bill of complaint, and the hearing thereof not being concluded, the further *further* consideration thereof was postponed until to-morrow.

Upon application, leave is given the defendant to file additional grounds of demurrer.

From Minutes November Term, December 30th, 1880.

ASENATH A. WARE et al.
vs.
THE GALVESTON CITY COMPANY. } Ch. 150.

This day again came the parties to this suit by their solicitors; thereupon, again came on to be heard the defendant's demurrer to the complainants' bill of complaint, and the hearing thereof not being concluded, the further consideration thereof was postponed until Tuesday, January 4, 1881.

42 *From Minutes November Term*, 1880, *January 4th*, 1881.

ASENATH A. WARE et al.
vs.
THE GALVESTON CITY COMPANY. } Ch. 150.

This day again came the parties to this suit by their solicitors; thereupon again came on to be heard the defendant's demurrer to the complainants' bill of complaint, and the hearing thereof not being concluded, the further consideration thereof was postponed until to-morrow.

From Minutes November Term, 1880, *January 5th*, 1881.

ASENATH A. WARE et al.
vs.
THE GALVESTON CITY COMPANY. } Ch. 150.

This day again came the parties to this suit by their respective solicitors; thereupon the argument upon the defendant's demurrer to

the complainants' bill of complaint was resumed and concluded, and the cause submitted to the court for its determination.

From Minutes November Term, 1880, *January 8th*, 1881.

ASENATH A. WARE et al.
vs.
THE GALVESTON CITY COMPANY. } Ch. 150.

This day again came the parties to this suit by their attor-
43 neys, and it is ordered and adjudged by the court that the defendant's demurrer to the complainants' bill of complaint, which was argued and submitted at a former day of this term, be and the same is hereby sustained, and it is further considered by the court, and so ordered, that the complainants herein be allowed until the next rule day to amend their bill.

Amendment to Bill.—Filed February 4th, 1881.

United States Circuit Court, eastern district of Texas, at Galveston.

ASENATH A. WARE et als., heirs of DAVID WHITE,
vs.
THE GALVESTON CITY COMPANY. } Ch. No. —.

To the hon. the said court:

By leave of court plaintiffs amend their bill and allege—

That David White, their ancestor, died on the 10th day of December, A. D. 1841; that at time of his death he resided in and was a citizen of the state of Alabama; that said David White left a will whereof Robert J. Ware, a citizen of the state of Alabama, was executor; that said will was duly probated in the state of Alabama, but never probated in the republic of Texas, or in the state of
44 Texas; that under said will there was due administration of the estate of David White, dec'd, and said administration has been closed for many years prior to the filing of this bill.

That one William B. Lipscomb, now and then a resident of Texas, qualified as administrator of estate of David White, dec'd, in Texas, without probating the will; that said administration was solely for the purposes of bringing the suit against M. B. Menard, which suit is mentioned & referred to by M. B. Menard by his memorial to the defendant herein in 1851, as is more fully set out in other parts of this bill; that after the dismissal of the said suit, as alleged in this bill, no other or further action was taken under said administration, and the same has long since lapsed by operation of law, and said Lipscomb is not now administrator of the estate of David White, deceased; that there is no administration now pending of or on the estate of David White, dec'd, and no necessity of administration; that said estate of said White owes no debts.

That under and by the will of David White, dec'd, the whole of

his estate passed to and became property of plaintiffs and Mary A. White, the surviving widow of David White, dec'd.

That Mary A. White, aforesaid, died many years ago, to
45 wit, on the day of ; that at time of her death she was a resident citizen of state of Alabama; that she left a will, under and by which the whole of her estate passed to and became property of plaintiffs; that the said will has been duly probated in the state of Alabama, and her estate duly administered thereunder, and administration closed long prior to filing of this bill.

That her said will has not been probated in state of Texas; that there is no administration pending in Texas or Alabama on the estate of said Mary A. White, and no necessity for administration, and no debts owing by said estate.

That under the laws of distribution and descent of Alabama and Texas, plaintiffs are sole heirs-at-law of said David White and Mary A. White, dec'd, as as well as sole owners of all property of their said estates under said wills.

Plaintiffs allege, as amendment, and in addition to the 54 section of their bill, that since the 21st of *the* 21*st of* April, 1858, defendant has never allowed any one, not even its own members, its stockholders, to examine any of the books, papers, or records of the company in or out of the presence of the board of directors, for any purpose whatever; but have construed said order to prohibit any examination by any person, at any time and in any manner, and have so acted on it.

MANN & BAKER,
46 M. C. McLEMORE,
GRESHAM & JONES,
Solicitors for Plaintiffs.

The foregoing endorsed as follows, to wit:

Ch. No. 150; Asenath A. Ware et als. *vs.* The Galveston City Company; amendment to plaintiffs' bill; filed Feb'ry 4, 1881; C. Dart, clerk.

Removal of Demurrer by Defendants.—Filed March 7, 1881.

In the Circuit Court of the United States, eastern district of Texas, at Galveston.

Between ASENATH A. WARE and others, complainants,
and
THE GALVESTON CITY COMPANY, defendant. } In equity.—No. 150.

The defendant having filed its demurrer to the complainants' bill in the above cause on the 6th day of Dec'r, 1880, and filed other and additional grounds thereof on the 29th day of Dec'r,
47 1880, and the said demurrer having been heard by the court and sustained by the court—

Whereupon the complainants took leave to amend their bill, and have filed their said amendment in this court on the 4th day of February, 1881; now comes the said defendant, the Galveston City Company, and renews its said demurrer to the complainants' original and amended bill, and sets down as causes of demurrer thereto all the grounds and causes set forth and specified in their said demurrer, filed the 6th day of Dec'r, 1880, and on the 29th day of December, 1880; and also the further and additional grounds that said complainants do not set forth and show their right and title to sue under the wills of David White or of his wife as set forth in said amended bill, and that said wills are not, nor is either of them, shown to have any force or effect, or ever to have been admitted to probate in this state.

Wherefore the defendant prays the judgment of the court *prays the judgment of the court* whether it shall be compelled to make any other or further answer to the said original and amended bill, or any of the matters and things therein contained, and prays he be hence dismissed with its reasonable costs in this behalf sustained.

48 BALLINGER & MOTT,
W. H. GODDARD,
Counsel for Defendant.

We certify that in our opinion the preceding demurrer is well taken in point of law.

BALLINGER & MOTT,
Counsel for Defendant.

The preceding demurrer is not interposed for delay.
We waive the above affidavit with same effect as if made.

MANN & BAKER,
March 7, '81. *Of Counsel for Pl'ffs.*

The foregoing instrument endorsed thus:

Equity No. 150; Asenath A. Ware & others *vs.* The Galveston City Company; renewal of demurrer by defendant; filed M'ch 7, '81; C. Dart, clerk, by James T. Spann, dep't; Ballinger & Mott, W. H. Goddard, counsel.

49 *Decree.*—From Minutes March term, April 4th, 1881.

ASENATH A. WARE et al.
vs. } Ch. 150.
THE GALVESTON CITY COMPANY.

The demurrer put in by the defendant to the whole of plaintiffs' bill as amended coming on to be heard in the presence of counsel for plaintiffs and defendant, and thereupon, upon consideration thereof, it was adjudged, ordered, and decreed that said demurrer be sustained to the whole of plaintiffs' bill, and said bill be dismissed, and that defendant go hence and recover of and from the said plaintiffs all costs in this behalf sustained.

Whereupon the said complainants, Asenath A. Ware, David P. Lumpkin, David White, Mary Ann Holtzclaw and her husband, James T. Holtzclaw, Thomas Coles, Daniel O. White, and Clement White, by their solicitors, in open court prays an appeal to the Supreme Court of the United States, which is allowed, and bond to be given on said appeal is fixed at two hundred and fifty dollars, to be filed within ninety days from this the 4th day of April, A. D. 1881; and at the same time in open court the defendant, by its solicitors, appears and accepts service of said appeal and waives citation thereon.

50 *Bond for Appeal.*—Filed May 2d, 1881.

Supreme Court of the United States.

ASENATH A. WARE et al.
vs.
THE GALVESTON CITY CO. } Eq. No. —.

Know all men by these presents, that we, Asenath A. Ware, Mary A. Holtzclaw, James T. Holtzclaw, and David P. Lumpkin, who are of plaintiffs in above cause and residents of county of Montgomery, state of Alabama, and William J. Jones and A. C. Baker, residents of county of Galveston, state of Texas, are firmly bound unto the Galveston City Company of Galveston, Texas, in the sum of two hundred and fifty dollars, to be paid to the said Galveston City Company and its successors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals.

Dated this the 16th day of April, 1881.

Whereas the above-named Asenath A. Ware, Mary A. Holtzclaw, James T. Holtzclaw, & David P. Lumpkin and the other complainants in said suit, hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-
51 entitled cause by the Circuit Court of the United States, fifth circuit, eastern district of Texas, at Galveston—

Now, therefore, the condition of this obligation is such, that if the above named A. A. Ware, Mary A. Holtzclaw, Jas. T. Holtzclaw & D. P. Lumpkin shall prosecute the said appeal to effect and answer all costs if they shall fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect & virtue.

ASENATH A. WARE. [SEAL.]
MARY A. HOLTZCLAW. [SEAL.]
J. T. HOLTZCLAW. [SEAL.]
D. P. LUMPKIN, [SEAL.]
By J. T. HOLTZCLAW.
WILLIAM J. JONES. [SEAL.]
A. C. BAKER. [SEAL.]

STATE OF ALABAMA, }
Montgomery county. }

I, Thomas J. Molton, notary public in and for the county and state aforesaid, certify that Asneth A. Ware, Mary A. Holtzclaw and James T. Holtzlaw, whose names are signed to the foregoing conveyance, and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand and seal this 16th day of April, A. D. 1881.

[SEAL.] THOS. J. MOLTON,
Notary Public for Montgomery county, Alabama.

52 This bond is approved in open court this the 2d day of May, A. D. 1881.

AMOS MORRILL, *Judge.*

The foregoing endorsed thus:

Ch. No. 150; filed May 2d, 1881; C. Dart, clerk, by James T. Spann, deputy.

Order approving bond.—From minutes March term, May 3d, 1881.

ASENATH A. WARE et al. }
vs. } Ch. 150.
THE GALVESTON CITY COMPANY. }

On the 2d day of May, 1881, in above cause, the appeal bond of complainants was duly presented in open court, and approved by the court.

53 In the Circuit Court of the United States for the eastern district of Texas, in the fifth circuit, at Galveston, Texas.

I, C. Dart, clerk of the Circuit Court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and of all the proceedings in cause No. 150 on the equity docket of said court, entitled "Asenath A. Ware and others, complainants, *vs.* The Galveston City Company, defendant," as the same now appears on file and of record in my office.

To certify which, witness my hand and seal of said court, at Galveston, in said district, this the 27th day of May, A. D. 1881.

[SEAL.] C. DART,
Clerk U. S. Circuit Court, E. D. T., at Galveston.

(Endorsement on cover:) E. Texas, C. C. U. S.; No. 264; Asenath A. Ware et al., appellants, *vs.* The Galveston City Company; filed 19 July, 1881; 53 pages.

11-170

MAY 4 1904
JAMES H. McKENNEY, Clerk

No 264.

In the Supreme Court of

THE UNITED STATES.

ASENATH A. WARE ET ALS., APPELLANTS,

vs.

THE GALVESTON CITY COMPANY, APPELLEES.

Appeal from District Court of the United States, Fifth Circuit, Eastern District of Texas.

BRIEF FOR APPELLANTS.

Oleander Printing Co., 67 Mechanic St

No 264.

In the Supreme Court of

THE UNITED STATES.

ASENATH A. WARE ET ALS., APPELLANTS,

vs.

THE GALVESTON CITY COMPANY, APPELLEES.

Appeal from District Court of the United States, Fifth Circuit, Eastern District of Texas.

BRIEF FOR APPELLANTS.

Concise Statement of the Case and the Questions involved, and manner in which they are raised.

Bill by Appellants, as Heirs of David White, deceased, for Foreclosure of lien for $14,450 and interest, on Twenty-Nine Shares of Stock held by Appellee in Trust for Benefit of Appellants.

The appellee is a corporation, whose capital stock is land, purchased by its promoters from the Republic of Texas, and paid for by David White, who held a mortgage on the land to secure payment. The land was bought by Michael M. Menard and nine co-associates as promoters and organizers of the Galveston City Company; before they issued stock, other parties, represented by one Triplet, claiming a part of this land, by title adverse to Menard and his associates, and also organizing a stock company for its sale, compromised their conflicting claims with Menard, by agreeing to take 200 of the thousand shares to be issued, clear of the lien of the purchase money, $50,000, due,

White, and to secure the clearance of the Triplet 200 shares from the mortgage lien to White. An agreed number of shares of the balance of stock belonging to Menard and his associates was set aside as a trust fund to be held by the company, and sold for the payment and discharge of the mortgage debt to White.

The one thousand shares of stock were duly issued; Triplet and his co-associates took their 200 shares; Menard and his co-associates divided out among themselves the remaining 800 sharess, less 400 shares reserved as said fund to pay this debt to White and expenses of organization, and to make good about 33 shares previously sold to third parties by Menard and his associates.

Menard was employed by the company, the appellee, as its agent, to sell the stock reserved to pay White.

Menard sold most of the stock, and paid off all the $50,000, but this $14,450. From 1838 to 1841 appellee was an organized, unincorporated joint stock company, called the Galveston City Company.

The company was afterward, in 1841, incorporated under the same name and style; and after incorporation the company had 39 shares left of the stock held to secure the Triplet interest against the White lien on the land, the capital of the company; and it is to compel a sale of these 29 shares of stock by the Galveston City Company that this bill is brought. (P. 1 to 11.)

The bill was dismissed on demurrer. The Court did not state the grounds on which it sustained the demurrer of the Galveston City Company.

The questions involved as shown by the demurrers and argument for appellee in court below are:

First—Stale demand.

Second—As to legal identity of the corporation with the joint stock company which obtained incorporation.

Third—That the bill does not show that the plaintiffs have the right to bring suit in the capacity of heirs of David White, deceased.

Appellants assign as errors:

First—That the demurrer was improperly sustained, because the allegations of the bill admitted by the demurrer show that doctrine of laches and State do not apply; because the bill shows that the Galveston City Company, after incorporation and as a corporation, holds the 29 shares of stock as trustee under a direct express trust for the plain-

tiff's benefit, and that the company formally and fully acknowledged that it held 29 shares for the payment of the balance due estate of David White.

STATEMENT UNDER FIRST ASSIGNED ERROR.

The bill in substance alleges that the appellee is a corporation for the sale of land, the town site of Galveston; that this land was bought with money borrowed of David White, and a morgage lien given on the land to secure its payment; that this was done by and in the name of M. B. Menard, the agent, promoter and managing partner of appellee before its incorporation; that under a contract of compromise of conflicting interests to part of the land, the capital of the company, with one Triplet, Menard and his assocates, the owners of the land and promoters of the company, gave Triplet 200 of the 1000 shares representing the land; and as Menard and associates owed for expenses of organization and $50,000 for the purchase money of the land, and said purchase money was secured by mortgage on the land, a number of certificates, estimated of sufficient value, were set aside from the number belonging to Menard and associates, to be held by the company and sold, and proceeds applied to the payment of said expenses and of this lien on the land. All the balance of the shares of the company were issued to Menard and his associates and those to whom they may have sold shares.

The bill further alleges that on the 10th day of March, 1841, ten years after the company had been incorporated, Michael B. Menard, then a member of the Board of Directors of the Corporation, reported in writing to the company that he, as agent of the corporation, held 29 shares of its capital stock, being residue of 50 shares belonging to the company, placed in his hands by the company to be sold, and the proceeds applied by him to the debt due David White, which said debt was the purchase money of the land, the capital of the company. That in this report Menard reviews the history of the matter, and recites in brief and substantially as follows: The purchase in 1836, by himself and associates, of the land and labor of land; that David White became the acceptor of him (Menard) for $50,000, the purchase money thereof; that he, Menard, was acting as manager for the company, the defendant, then being formed, and his liability to White for said amount was incurred for the company; that the company had paid through him $35,550 realised from stock of the companybelongs

ing to company, and in his Menard's hands for that purpose; that without calculating interest there remained a balance due the estate of David White, deceased, of $14,450; that after the payment in 1838 or 1839 of $25,000 by the company, through him, the Galveston City Company further intrusted him with 50 shares of the stock of the company belonging to the company for payment of the said amount due White, which was then thought amply sufficient to cover the balance then due.

That in the year 1839 he, Menard, had realized from proceeds of 21 shares of the 50 the sum of $10,550, and had paid the same on said debt; that owing to the badness of the times and the depreciation in real estate, and stock representing real estate, he has not been able to do any better; that he, Menard, was being sued individually by the estate of David White for the sum due of $14,450; that he, Menard had in his hands 29 shares of the 50 of the stock of the company, belonging to the company of the then market value of $5,800 in the aggregate, which would leave a deficiency of $8,650 on the $14,450 of the principal of the amount due White's estate without calculating interest that he, Menard, did not then set up any claim for interest, which might have to be paid, nor of the expenses, trouble or responsibility that he, Menard, had incurred. Menard by said report then suggests and asks that the appellee, his principal, make provision for the payment of the deficiency, he estimates will occur as aforesaid, and that such provision be made by a par credit on the books of the company to the estimated amount of the probable deficiency and for $13,000 paid by him, Menard, out of his own means to one Johnson for the use and benefit of the Galveston City Company, making a total of $21,650. (Page 1 to 8).

The bill also alleges, in substance, that the Board of Directors of the corporation, formally approved the report as made by their agent Michael B. Menard, and made the provision suggested to cover any deficiency between the value of the trust fund, the 29 shares of stock, and the amount of principal then remaining unpaid on the purchase money of the land, which is the capital of the company, which had been paid by David White as the acceptor of M. B. Menard, who, though acting in his own name, was in fact the managing agent of the company, for the organization and promotion thereof.

This formal acknowledgment of the corporation, the appellee, by action of the report of Menard, that it held the 29 shares of stock, of

its own capital, for the satisfaction of this balance due the heirs of David White is sufficient to show that the corporation holds the 29 shares, that the bill alleges have never been applied by appellee to the payment of the debt which is still due.

See—Angel and Ames on corporations, 9 Ed., Secs. 659 and 5304.

Fleckner vs. U. S. Bank, 8 Whet. 363.

The holding by the corporation of the stock for payment of lien on the land owned by the corporation, and under an express contract under which it received the land and the stock to the effect that the 29 shares of stock should be used for that purpose as part of the consideration of the compromise with Triplet, and to enhance the value of the 200 shares he was to get, by freeing the land the stock represented, from the lien of the mortgage debt to White, and to protect Triplet against the debt the Menard company owed for the payment of the purchase money of the title under which the Menard associates claimed the land, which land he Triplet also claimed under adverse title; made the corpopation, the holder of the 29 shares, a trustee for David White as it holds the land, by the incorporation of the stock holders owing the stock representing the land issued under this compromise of the conflicting titles in Menard and associates and Triplet and associates. This trusteeship made under contract with and for benefit of third parties, the holders of the 200 shares, Treplet was to get, free of the debt of White, is as much a direct express trust, made by contract and not cognizable in law, but exclusively equitable, as if it had been made by the appellee with, and exclusively for the benefit of David White. The fact that the appellee did not apprise White or his heirs of the existence of this trust, cuts no figure when it is found out by White's heirs, and the company has not repudiated it, but the last action of appellee, as to this matter, is to perpetuate the facts by spreading Menard's memorial on the minutes of the company, and the passage of a resolution of its directory of which Monard was a member, approving the report of his acts as agent of the company; and this was done in 1851, ten years after the appellee had been incorporated. The fact that appellee is a corporation does not prevent it's being a trustee.

Vidal vs. Girard, 2 How 187–188.
Bell vs. Alexander, 22 Texas 359.

SECOND ASSIGNED GROUNDS OF ERRORS.

The court erred in sustaining demurer: As laches and stale demand do not apply as between trustee and *cestui qui* trust of an express trust, as no time runs until there is a refusal to execute the trust, and the *cestui qni* has notice of such refusal.

STATEMENT.

The only direct affirmative action by the corporation the defendant was on March 10th, 1851, when by it's action on the report of Menard, it acknowledged that it still held 29 shares to be sold for payment of the balance due on the land, its capital, and that Menard was its agent for the sale of this stock, and payment of its proceeds of White's heirs. The only express demand made on the company was in January 1880, the year of this bill was filed, and to this demand the defendants made no reply, and their then refusal is only an inference from silence, and from their demurrer of stale demand. It will be borne in mind that the appellant only asks that appellee be required to execute its trust and sell the 29 shares of stock set aside by Menard and his associates under contract with Triplet, that part of the Menard and associates stock should be placed with the company to be sold for the clearance of the land from the lien placed on it by Menard and his associates and to the end that Triplet and his associates should get their proportionate part of the stock net, and clear from the outstanding lien on the land, the capital of the company, and to the end that Michael B. Menard should be protected, who had, though only an agent, incurred this lien in his own name, and to the end that all the stock of the company might stand in the markets of the world as that of a company whose capital was practically freed from lien by ample provision, held by the company itself, for the liquidation of its liabilities. No time can run against such a trust, until formal repudiation of the trust, by the trustee, the corparation, by action of its directory, and it is questionable whether a court of Equity would hold that a corporation could repudiate a trust that was part of the very fiber and texture of its capital, and its existence, and made with its share holders, and for enhancement of the value of their stock, as well as for the payment of a third party, David White.

THIRD ASSIGNED GROUND OF ERROR.

The court erred in sustaining the demurrer on ground of stale de-

mand, because the particular facts of the case show that stale demand does not apply, and the bill shows the evidence of plaintiffs rights are not dependant on the frailty of memory as to what transpired, but it is all a matter of record, and that record, the title papers, stock books and record of proceedings of the directory of a corporation, the defendant, and that defendant, a trustee, holding shares of its own capital stock to secure unpaid balance of purchase money for land, and that land the capital of the defendant, and the amount due is due by the corporation as part of the purchase by which it acquired the Triplet title to the land.

Badger vs. Badger, 2 Wall. 93.
Michou vs. Girard, 4 How. 503.

STATEMENT.

The bill shows that the debt sued for was incurred by Menard, in his own name, he holding the title in his name, but for use of his associates, who bought it for the capital of a joint stock company, to be organized to sell the land in town lots. That when the company organized as a joint stock unincorporated company, Menard transferred legal title to three trustees for the company; the payment of the debt sued for was provided for (page 2–3). This debt was further recognized and provided for by report of Menard to the company, after it was incorparated (page 6–7). So all the evidences of the transactions alleged are evidenced by writings in the custody of the defendant.

FOURTH ALLEGED ERROR.

The bill shows that there has been fraud and concealment, and time does not run, until discovery of rights of complainants.

STATEMENT.

After White's death, Menard, in whose name the lien and debt has been contracted with White, was sued, Menard was then, and had been at time the debt was contracted, agent for the company. Menard obtained formal recognition of the debt and lien, and provision for its payment, from the corporation. No notice of this is given by Menard or the corporation to the administrator of White's estate.

Menard pleads limitation to the suit and finally gets it dismissed on his motion for want of prosecution. The company seal their books containing only evidence of the fact against inspection. The company took deed from Menard for the land in 1842, thus misleading White's

heirs, and concealing the true chain of title which contained express provision for their payment (page 9–10).

When White's heirs, non-residents of the State, make discovery of their rights, by the facts of record in the books of the company, coming to light by a suit brought by a third party, they, White's heirs, then, in year 1880, make request of the company to pay, and ask what become of the provision for their payment, as shown by the report made to the company by Menard in the year 1851, and the company's action thereon. No answer was made to this request by the company, the trustee holding 29 shares of stock, and also the debtor holding the land as its capital by purchase from the Republic, which it made in 1836 with David White's money. In the year 1851 it had put on record on its own books a solemn admission that there was then a balance due of $14,450 on this debt for the purchase money of the land, and that they held 29 shares of its own stock in trust to pay it. When this bill is filed, the company demurs on ground of stale demand.

Michou vs. Girard, 4 How. p. 561.
Badger vs. Badger, 2 Wall. 93.
Prevost vs. Gratz, 6 Wheat. 497–8.

FIFTH ASSIGNED ERROR.

That the bill negatives stale demand, as it shows formal recognition of a trust by a private corpopation, the only evidence of which is in its minutes and records, and which is not known to the *cestui qui* trusts, and as to which they are not put on inquiry, and time should only date as to plaintiffs rights from such date as this action of the company became known to the *cestui qui* trusts; and further, that the recognition of the trust as to the 29 shares by the Galveston City Company, and further provision for payment of any balance due on the claim which was a lien on the land, the capital of the company, is equivalent to what would be in law, a ratification and recognition of the debt, and a new promise to pay; and this stands unrevoked on the books of the company.

SIXTH GROUND OF ERROR.

That the bill shows good reasons excusing the lapse of time, in the fact, that David White and his heirs were residents of Alabama, and Galveston was in a foreign country from 1836 to 1848, and that up to 1870 Texas was difficult of access to residents of Alabama; also that

the transactions with David White were made with M. B. Menard, in his own name, and even after the formal organization of the company, the appellee, the payments made by appellee on the debt, which reduces it to the $14,450, sued for, the last payment being in 1839, was made by Menard as if is was an individual matter. That David White dies on the 10th day of December 1841 (page 6). That administration was had in Texas on the estate of David White for sole purpose of sueing Menard for his claim. That said Menard defended said suit as if it was his individual matter, and was from 1845 to 1851 continuously pleading to said suit, the bar of the statute of limitation (page 8-9). Even during the very time he was reporting to the company that it was due by it, contracted by him as the company's agent for the purchase of the land, the capital of the company, and reporting to the company that 29 shares of the original provision of stock for the sale and payment of this lien claim, remained in his hands, as agent for the company to sell it. That said suit of the administrator of David White was dismissed on motion of M. B. Menard, soon after the report made by him. That his report and the action of the company were neither known to the representatives of White, nor could they have become known to them, as they were only in the private books of the company, to which the company has at all times refused appellant's access, when requested as to other and different demands against the company. That since 1858 the company has by formal resolution, refused inspection to any one, and has not permitted even its directors to examine its books, except in presence of the board of directors.

That the existence of said report and action of the company thereon only became known to plaintiffs within two years of the filing of their bill, and only came to light under a subpœna *duces tecum* for the books of the company, in a suit of other parties against the Galveston City Company brought a few years back (page 8-9).

That the Galveston City Company has not claimed through the true chain of title to the sovereignity of the soil to wit: Republic of Texas to Menard. Menard to the three trustees. These trustees to the directory of the Galveston City Company. But said company did on January 1st, 1842, have M. B. Menard, execute a deed direct to the corporation under which it claims the land as purchaser. That by said claim of title through said second and not through true claim of

title, plaintiffs have been mislead and not put upon notice of the trust provisions made in said real chain of title for the protection and payment of said lien claim due David White. That plaintiffs did not know of said real chain of title until about January 1880 (page 8-10).

Oliver vs. Piat, 3 How. 411.
Seymour vs. Freer, 8 Wall. 218.
Hunter vs. Hubbard, 26 Tex. 456.
Danl. Ch. Pr., 5 Ed. Mp. 644-5.

SEVENTH GROUND OF ERROR.

The court erred in sustaining demurrer on ground of stale demand. Because though the bill is specially directed to foreclosure on stock held by the defendant as a trustee, yet as the bill discloses, that the amount, the trust fund, is to secure, is an unpaid balance of purchase money of land, which is the capital of the company, the appellee, and by the very purchase by which the defendant acquired the land, and this purchase was made by grant from the Republic of Texas, by a public or general acts of its Congress, and as such judicially known to the court, and his act granting the land reserved a special lien for payment of purchase money which was paid by David White for the vendees, and paid under a contract with Menard, whom it now appears was as agent or managing partner of the vendees, by which White's relationship as to such payment was acceptor for the amount of the purchase money. Then if the court held the enforcement of the trust as to the 29 shares is stale, still, under a prayer for general relief, the court would decree that the defendant pay the balance due White, on the ground that where there is an express lien retained for the purchase money of land that an acceptor of the vendee who paid the purchase money, is subrogated to the express lien of the vendor, and entitled to enforce it. As the title to the land is in the vendor and those subrogated to his rights, where there is an express lien rendered for purchase money until payment, and a court of equity will not drive the parties to trespas to try title for the land itself, when it has jurisdiction of all parties in pending suit, and the right of subrogation to the express vendor's lien, and its foreclosure is a pure equity. A lien for the protection of government for the purchase money of the land, the capital of the company, was embraced in the law that authorized its sale. "A special pledge is retained on the property for the payment of the

further sum, etc," is to be found in the act of Congress of the Republic. Paschal's Digest of the Laws of Texas, sec. 4348.

Another ground of demurrer, as we understand the grounds presented by the appellees is, that as to the amount due David White there is no legal identity between Menard and his associates, the purchasers of the land, and the joint stock unincorporated company which they organized, with the land as the capital; and further than this, there is no legal identity as to the amount due David White, as between the Galveston City Company, a joint stock unincorporated company, and the legal entity, the corporation, made by incorporating its stockholders, under the same name and style. If the court below could have put its unstated reasons for sustaining the demurrer on this ground, then, as eight ground of error, it is assigned:

That where individuals associate themselves and purchase land for the capital of a stock company, and give a lien on the land to a third party who has paid the purchase money, and the joint stock company is organized, and after a time is incorporated, there is an absolute legal identity between the corporation and the original purchasers of the land, as far as responsibility for the amount due on the land, where that amount is less than the value of the land. That is where the parties *inter se* clothe themselves with atribute of individuality by agreeing that their common property, land subject to lien for purchase money, shall be the capital of the company, and their respective interests is only in the net proceeds of that property, as evidence by certificate of stock; and that those comprising the company shall not be known to or by this company as individuals, but only as shareholders; then, when the shareholders are actually merged by incorporation into an entity, recognized by law as capable of being sued, and only liable to the extent of its capital, the land, the corporation is to that extent legally one, and the same as those who bought the land as to the purchase money due therefor, if a third party to whom the money is due chose so to consider the corporation.

STATEMENT.

Menard and his associates bought the land, the capital of the defendant. Menard transferred the title to three trustees for them to issue stock to the agreed value of the land, and for formal organization of the company, with express provision for payment of the purchase money lien. They issued the certificates of stock, and this

stock elected a formal directory. This directory, for the purpose of keeping formal transfer books, issued substitute certificates of the same number and par value, to be given on the surrender and cancellation of the original certificate of corresponding book and number. The original or trustee cirtificates were thus surrendered, and the directory certificates issued instead of them at various dates before and after the incorportion of the company, and are now the certificates the stock of the company. The company of the moment before incorporation was identical with that the moment after, and the joint stock company before incorporation was by contract a corporation, as between it and its members.

NINTH GROUND OF ERROR.

That if the court sustained the demurrer to the bill on the ground that the plaintiff's allegations are not sufficient to show that they had a right as heirs of David White to bring the suit; such holding was error in that, the bill alleges that they were the only heirs at law of David White (p. 1, 7), and the bill shows that White died in 1841 (p. 6), and that the only administration in Texas was for the purpose of bringing a suit that was dismissed in 1851; that no administration is pending on the estate of David White, deceased, and no necessity for administration; that said estate owes no debts (p. 20); that David White by will left all his property to plaintiffs and his widow, Mary White; that she left all her property to plaintiffs, and no administration is pending on her eatate, and no necessity therefor, and no debts owing from her estate.

That plaintiffs are sole heirs at law of David and Mary White, and sole owners of all their property under their wills (p. 21); and it is well settled that these allegations show a right in plaintiffs to bring suit as heirs.

1 Dan'l Ch. Pr., p. 320.
Rubber Co, vs Goodyear, 9 Wall, 792.
Noonan vs. Bradley, 9 Wall, 3954.
Lacy vs. Williams, 8 Texas, 182.
Clay vs. Clay, 13 Texas, 195.

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